

STATE OF CALIFORNIA

SENATE SELECT COMMITTEE TO INVESTIGATE
PRICE MANIPULATION OF THE WHOLESALE ENERGY MARKET

VOTE RE: REPORT TO THE FULL SENATE REGARDING
CONTEMPT FINDINGS FOR ENRON AND MIRANT

STATE CAPITOL
ROOM 3191
SACRAMENTO, CALIFORNIA

WEDNESDAY, JULY 11, 2001

10:27 A.M.

Reported by:

Evelyn J. Mizak
Shorthand Reporter

APPEARANCES

MEMBERS PRESENT

SENATOR JOSEPH DUNN, Chair

SENATOR DEBRA BOWEN

SENATOR WES CHESBRO

SENATOR MARTHA ESCUTIA

SENATOR MAURICE JOHANNESSEN

SENATOR SHEILA KUEHL

SENATOR WILLIAM MORROW

SENATOR BYRON SHER

STAFF PRESENT

ALEXANDRA MONTGOMERY, Committee Consultant

RONDA PASCHAL, Committee Consultant

LARRY DRIVON, Special Counsel to Committee

IRMA MORALES, Committee Assistant

WADE TEASDALE, Chief of Staff to SENATOR MORROW

ALSO PRESENT

SENATOR STEVE PEACE

ROBERT A. PRATT, Deputy Legislative Counsel
Office of Legislative Counsel

CHRISTOPHER ZIRKLE, Principal Deputy
Office of Legislative Counsel

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1 P-R-O-C-E-E-D-I-N-G-S

2 -- oo0oo--

3 CHAIRMAN DUNN: We have just got word that
4 Senator Morrow is delayed a little bit longer.

5 We will start the hearing now, so, welcome
6 everybody, to our umpteenth hearing on the investigation. We
7 are here today specifically to zero in on the issue of the
8 continued contempt process as to Enron and to Mirant.

9 Before we get into that, I want to address a
10 couple procedural issues and one other issue that has been
11 brewing for about two weeks now regarding the Duke facility and
12 the ISO information.

13 First, the next hearing that we've got scheduled
14 is for next Wednesday, a week from today. That hearing, at
15 least as of right now, is to follow-up on our last hearing
16 concerning the potential contempt or the issue of contempt as to
17 the other market participants that received service of the June
18 11th subpoenas that are not at issue here today. We may end up
19 dealing with some of these issues, it may spill over until next
20 week, but we'll see as the hearing unfolds this morning.

21 With respect to the issue of the Duke facility
22 and the ISO information, I want to update everybody, and
23 certainly welcome, if anybody wants a copy of the series of
24 letters that has gone back and forth between my office, and
25 Senator Morrow's office, and the ISO, and between Duke and us as
26 well.

27 Here's my concern and why I want to address this
28 at this point in time, because there's been some misperceptions

1 that have unfortunately developed.

2 First and foremost, when the three witnesses came
Page 1

3 forward several weeks ago and testified as to their observations
4 of the Duke South Bay facility, this Committee did not draw any
5 conclusions. In fact, I think at least in my review of the
6 press accounts, the Committee Members that were interviewed were
7 very, very cautious in their comments that, in fact, no
8 definitive conclusions were being drawn by this particular
9 Committee.

10 Comments that others may have made that are not
11 on this Committee are certainly outside of our control and not
12 at issue with respect to our particular investigation.

13 The Committee's position was, it was interesting
14 information, but we needed to see much more information before
15 any definitive conclusions could be drawn about what occurred in
16 those three days referenced in the log reports that one of the
17 witnesses brought forward.

18 As everyone here is aware, Duke was very critical
19 of the fact that they were not given an opportunity to testify
20 on that very day with respect to the information that the three
21 witnesses had shared with the Committee.

22 The rules of the road, so to speak, for this
23 process were established a long time ago with everybody's
24 input. It was decided that the Committee would review primarily
25 positions critical of the market and the market participants,
26 and then certainly give full hearings to those market
27 participants to provide, if I may just call it, the other side
28 of the story, and that this Committee would at no time draw

1 definitive conclusions until we heard everything.

2 I don't mean to draw the analogy to a court
3 process, because there are critical distinctions between a
4 legislative investigation and a court process, but in a trial,
5 someone does not get to respond at the end of every trial day.

6 And they wait until they get their turn to present their case,
7 and the jury is cautioned not to draw any definitive conclusions
8 until the very end.

9 That was the process we embarked upon at the
10 outset, and everybody was aware of that.

11 I understand Duke's concerns that some of the
12 spin that was being developed, not by this Committee or its
13 Committee Members but by others, of that testimony was unfair
14 because it was based upon incomplete information. I think there
15 is some merit to that allegation that they made. But again, it
16 wasn't a spin developed by this Committee or any Committee
17 Members.

18 I was equally disturbed, however, when Duke
19 approximately a week ago took a slice of data from the ISO and
20 attempted to spin it the opposite direction. That is, that the
21 limited data released by ISO with Duke's authorization somehow
22 allowed us to draw a definitive conclusion about what occurred
23 on those three days in January. That position is as equally
24 faulty as those who tried to draw definitive conclusions just
25 based on three witnesses' testimony.

26 It was as a result of those unfolding events that
27 both myself and Senator Morrow requested the full data from ISO
28 from which it's possible -- I can't guarantee it, but it's

1 possible -- to draw more definitive conclusions about what
2 occurred in those three days. And that's where there's been a
3 flurry of correspondence between the various offices that I've
4 identified. And we are happy to make available to anybody upon
5 their request that flurry of correspondence, again, between
6 Senator Morrow's office, my office, the ISO, and Duke.

7 Specifically, I've requested that certain
8 information be released with Duke's authorization. Duke will

9 not authorize the release of what I consider to be the full,
10 complete data that led up to those three days. Until that is
11 done, no definitive conclusions, one way or the other, can be
12 drawn.

13 I'll just share with you the last series in that
14 correspondence, which was my letter of July 5th to William Hall,
15 who is the Vice President, Asset Management, of Duke Energy,
16 North America. It says:

17 "Dear Mr. Hall,

18 "Thank you for your July 2nd letter. "

19 That's his cover letter sending me the letter they sent to the
20 Governor.

21 "As you are well aware,
22 no final conclusions can be drawn
23 about the output from the South
24 Bay facilities on January 16, 17,
25 and 18, 2001 as of yet.

26 "Neither the testimony
27 from the witnesses nor the
28 partial ISO data released last

1 week allow for a definite
2 conclusion regarding the operation
3 of those facilities.

4 "The only way to reach
5 a definite conclusion is for
6 Duke to authorize the public
7 release of all the confidential
8 bidding data leading up to the
9 three days. Up to now, your
10 company has steadfastly refused
11 to allow the release of such

12 data.

13 "I urge you to grant
14 this authorization immediately so
15 the true picture can be realized.

16 "Additionally, I
17 continue to renew my demand for
18 an agreement from your company
19 not to destroy documents.

20 "Very truly yours,

21 "Senator Joseph L. Dunn. "

22 That was the last bit of correspondence. We
23 have received nothing further. Duke has not altered its
24 position as of yet about the release of the full data relating
25 to those three days.

26 Hopefully, that provides a little more clarity,
27 but it does not provide any definitive conclusions that anybody
28 can draw as of yet. We simply don't have the full picture yet.

1 And my hope is that no one engages in spinning on
2 incomplete information because that is a disservice, obviously,
3 to the entire process, and we are, of course, constantly being
4 bombarded by allegations of being politically motivated and not
5 unbiased in our investigation. So, we are very careful to
6 ensure that we at least try to do the right thing as much as we
7 possibly can.

8 So, thanks everyone for bearing with me as I
9 walked through that, but it's been disturbing, at least from the
10 Chair's perspective, to watch all of it unfold since the day
11 those witnesses first came forward and subsequently Duke's
12 release of the partial ISO data.

13 So, with nothing further about that, let's go
14 forward with the two issues we're dealing with today regarding

8ENERGY.TXT

15 Enron and Mirant and the process of contempt. We have
16 Mr. Drivon, Special Counsel to the Committee, before us at the
17 witness table. Why don't we have Bob or Chris -- yes, Senator
18 Peace.

19 SENATOR PEACE: Before you start on that process,
20 on the issue you were just discussing with respect to the ISO
21 and Power Exchange, I think it's important that folks not lose
22 track of the fact that the ISO, which was giving these orders,
23 was operating under a paradigm that was driven by the generators
24 and marketers.

25 That the manipulation of this market didn't just
26 occur in the discrete actions of a particular power plant or
27 power plants. It occurred by virtue of the actions of the same
28 generators and marketers that sat on the stakeholder board who

1 suppressed or ignored market surveillance reports, and who
2 literally invented a concept which they brag about in their --
3 if you look at their stationery it says, "Reliability Through
4 Markets." This is a concept invented by the ISO in which they
5 would rely upon the spot market to get reliability.

6 So, this debate about whether the ISO ordered a
7 ramp up of a power plant or it was done discreetly at the site
8 is irrelevant because the same people were in charge of the
9 rules as were in charge of the plants.

10 And I know I've come back to this many times, but
11 every time I want to keep reminding myself that there were many
12 paths and many opportunities for manipulation here.

13 And every action taken by the ISO during this
14 period was being run by an ISO that was controlled by the
15 actions of the generators and marketers, including its Chairman,
16 who was also the President of the Independent Energy Producers
17 Association at the time.

18 So, there's a lot of confusion out there that
19 when the ISO does something, it was, quote, "the state" doing
20 this. FERC expressly prohibited the state from having an
21 oversight board rule. Ms. Bowen was on the oversight board
22 during this period of time. But FERC told her, as an oversight
23 board member, expressly prohibited her from taking any action to
24 overrule the stakeholder board.

25 California, in 1890, gave Ms. Bowen, as an
26 oversight board member, the power to overrule the stakeholder
27 board. FERC refused to approve that provision, forced us to
28 pass another bill, taking the power away from economically

1 independent, politically appointed board members, gave all the
2 power to the politically independent, economically dependent
3 folk, and that's why you had an ISO that devised a system and a
4 mechanism that allowed generators and marketers to profit
5 through an operation and a methodology in operating the power
6 plants that weren't consistent with prudent power plant
7 operation.

8 So, we need to dispose of this fiction that
9 because Duke can say, "ISO told us to do it," that that means it
10 was some sort of independent government folk doing it. The ISO
11 was controlled by the same people.

12 CHAIRMAN DUNN: Thank you, Senator Peace.

13 Bob, if you would, please.

14 [Thereupon the witness,

15 LARRY DRIVON, swore to tell

16 the truth, the whole truth,

17 and nothing but the truth.]

18 CHAIRMAN DUNN: Thank you, Mr. Drivon.

19 I want to remind everybody, I don't think we're
20 going to be having that many witnesses testify today, but for

21 those, just recall that we have Evelyn here. She's back.
22 Welcome back, Evelyn.

23 Bear in mind the rules of the road when we have a
24 court reporter here to ensure that folks don't talk on top of
25 each other, so in fact the record can be clear. Although, for
26 those of you who have been watching throughout our hearings,
27 you'll know that Evelyn is not a shy individual when folks are
28 talking in a way that does not provide for clarity on the record

1 itself.

2 Mr. Drivon, what I want you to do, if you would,
3 please, let's start with Mirant, and then we'll go to Enron, and
4 discuss where we've come since our last particular hearing.

5 But before doing so, I do want to clarify some
6 confusion over this process of, quote-unquote, "contempt". It
7 is a process. It started in our last hearing, but for it to be
8 ultimately finalized and sanctions given upon them, this
9 Committee needs to take another step or two, and then ultimately
10 the full Senate has to act as well.

11 As I think most of you are now aware in looking
12 at this process that's rarely used, it is a process that has
13 several steps to it. Today is one more potential step in that
14 particular process.

15 With that, Mr. Driven, update us as to where we
16 are with respect to the first entity.

17 MR. DRIVON: First of all, Senator, you're
18 absolutely correct that the contempt procedure with respect to
19 all of the generators is at this point incomplete. My
20 understanding is we're going move forward today with respect to
21 two of the market participants, Mirant and Enron.

22 You're asking me for an update with respect to
23 what has taken place concerning Mirant since the last hearing.

24 The first thing that occurred was on June 28th,
25 we received a response to the subpoenas from Mirant. They
26 raised numerous objections, including a lack of jurisdiction and
27 other objections, on both a jurisdictional and evidentiary
28 nature. That was read and understood by us.

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1 And that day, Mr. Bittman appeared before this
2 Committee in the hearing, explained his company's position, and
3 advanced the ball to a considerable degree during that hearing,
4 but was unable, as the Chair will remember, to complete the
5 requested tasks at that time. Although Mr. Bittman tried
6 mightily to do that, it was not possible.

7 At that point, Mirant was found in contempt for
8 its failure to comply with the legislative subpoena that had
9 been issued.

10 The next day, actually first contact with Mirant
11 was later that day after the hearing, when I was in conference,
12 personal conference with Mr. Bittman concerning their position.
13 He indicated to me that he believed that Mirant and the
14 Committee could come to terms with respect to these issues and
15 appreciated the time that he was given before the contempt
16 process before this Committee was completed.

17 I spoke with him on the telephone a number of
18 times, but prior to that, on the 3rd of July, we sent a letter
19 to all counsel summarizing what the Committee expected to be
20 done should contempt procedure be interrupted with respect to
21 Enron and Mirant, and with respect to the other market
22 participants as well. That was done by way of letter.

23 On the 3rd, I and the Committee staff
24 participated in an extensive conference call with all counsel
25 representing the market participants concerning the proposed
26 confidentiality agreement and other issues with respect to

27 compliance with the subpoenas.

28 On the 3rd -- excuse me -- on the 5th, we sent a
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1 letter to all counsel making certain modifications in the points
2 by which the Committee was going to judge compliance concerning
3 the subpoenas, and those changes to reflect the discussions that
4 took place on the 3rd in the conference call.

5 On the 6th, we sent a letter by e-mail, fax, and
6 U.S. mail notifying counsel for Enron and Mirant that the 07-10
7 hearing was continued until the 11th in this room. And
8 additionally, the Committee sent a letter to counsel for AES,
9 Duke, Dynegy, NRG, Reliant, and Williams advising that the
10 hearing to consider compliance for those companies would be
11 continued to July the 18th.

12 I spoke with the Duke attorney with regard to
13 those communications, and on a Saturday, confirmed with him that
14 his client and the others named would not need to be here today
15 but would need to be here on the 18th.

16 I spoke with Mr. Bittman, representing Mirant, on
17 the 7th of July, during which time he indicated to me that
18 Mirant was securing a location for the document depository and
19 was forwarding priority responsive documents to that facility,
20 and arranged a meeting with me on Tuesday, July the 10th, to
21 discuss these matters in further detail.

22 I had a number of phone conversations with
23 Mr. Bittman, including a telephone conversation which took place
24 on July 8th, during which we discussed in particular the
25 specific confidentiality agreement provisions and the protocol
26 for the document depository and access thereto, together with
27 other issues having to do with compliance concerning the
28 subpoena.

1 In addition to that, I met with Mr. Bittman and
2 Mr. Starbird, both representing the defendant -- excuse me --
3 the market participant Mirant, concerning the confidentiality
4 agreement and the document depository protocol.

5 In addition to that, I had other telephonic
6 communications during that general time period concerning these
7 issues.

8 We came to an agreement last night with respect
9 to the confidentiality agreement, document depository protocol
10 and access thereto, with the representatives from Mirant who
11 were authorized by that particular market participant to enter
12 into that agreement, and I was taken to the site where the
13 documents have been deposited. I there had an opportunity to
14 look at the facility, which was then containing about 89,000
15 documents. I was given uncontrolled access to whichever of
16 those I wanted for the purpose of determining in general the
17 quality of the documents that had been deposited there.

18 I was told that at 10:00 o'clock last night an
19 additional 53,000 documents would be provided to that particular
20 facility. I was informed that the document depository would be
21 moved from its current location on the 21st Floor to a location,
22 a permanent location, on the 2nd Floor of the same building,
23 which I believe is United States Bank Building. Maybe I have
24 name wrong, but I can take you there.

25 CHAIRMAN DUNN: The lions in front.

26 MR. DRIVON: The one with the lions in front,
27 right.

28 CHAIRMAN DUNN: We operate on simple premises₁

1 here.

2 MR. DRIVON: Well, being from Stockton, I
3 appreciate your deference, Senator.

4 I was also told that this morning, by 10:00
5 o'clock, there would be an additional 20,000 documents, bringing
6 the total in that depository to something in the neighborhood of
7 160,000 documents.

8 I did, as a matter of fact, spend time there last
9 night, looking at the documents which I pulled at random from
10 the boxes. I found those documents to contain highly sensitive
11 information of the type that we have requested on our priority
12 list, including risk management documents, output logs,
13 confidential memoranda with respect to the plant operation,
14 maintenance, acquisition, and other particulars that we asked
15 for. And it would be my report, pending a more complete
16 investigation of those documents, that there is a substantial
17 number of documents responsive to our short list of highly
18 sensitive documents that has been produced by Mirant in that
19 fashion.

20 This morning at 9:30, I met with Mr. Bittman and
21 Mr. Starbird in the Senate office at 2080, and a confidentiality
22 agreement was signed by them. I secured your signature
23 thereon.

24 The agreement concerning the depository and
25 access thereto was also signed by yourself and by
26 representatives of Mirant, Mr. Bittman and Mr. Starbird.

27 It is my report that Mirant has been extremely
28 cooperative, very substantive in their attempts to come to

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1 agreement with the Committee. That they were willing to make
2 substantial changes in their positions that had previously been
3 stated with respect to matters involving confidentiality to
4 bring them in line with the provisions that this Committee was
5 willing to accept. That their production of documents by my
6 preliminary examination seems to be highly responsive to our

7 requests. They indicate to me that they intend in the further
8 and dramatic production of documents -- dramatic in terms of
9 quantity and quality -- over the next ensuing days and weeks,
10 and have no objection to their further compliance being examined
11 from time to time by the Committee.

12 We reserve in that confidentiality agreement the
13 right of this Committee to proceed by way of contempt under the
14 existing subpoenas in the future should compliance issues change
15 with respect to Mirant.

16 I have found their attitude to be cooperative. I
17 have found them to be pleasant to deal with, and responsive to
18 our requests, needs and demands.

19 CHAIRMAN DUNN: If I can summarize where we are
20 following your comments, in your dealings with the company, we
21 have a document depository that's been established here in the
22 downtown area.

23 MR. DRIVON: Yes.

24 CHAIRMAN DUNN: We have over 100,000 documents
25 that are currently in the depository.

26 MR. DRIVON: Yes.

27 CHAIRMAN DUNN: And your preliminary review
28 indicates that they appear to be responsive to our priority
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1 requests.

2 MR. DRIVON: Yes.

3 CHAIRMAN DUNN: They have signed a
4 confidentiality agreement that is acceptable to the Committee
5 and to Legislative Counsel.

6 MR. DRIVON: Yes.

7 CHAIRMAN DUNN: And your recommendation is that
8 we terminate the contempt process as to that company?

9 MR. DRIVON: I would recommend that the contempt

10 process be interdicted with respect to them, rather than
 11 terminated, because we reserve the right to proceed further with
 12 respect to the question of contempt should the issue of
 13 compliance change, but that the current process be interdicted
 14 and interrupted, and that any finding respect to contempt that
 15 has at least preliminarily taken place to this point be purged.

16 CHAIRMAN DUNN: From the Chair's perspective, for
 17 the Committee's benefit, I participated in several of those
 18 meetings directly, along with Special Counsel, with the
 19 representatives from Mi rant.

20 I'll tell you that I share the views of
 21 Mr. Drivon that they indeed, since the last hearing, have shown
 22 a high degree of cooperation and willingness to respond to our
 23 requests associated with the subpoena, including the document
 24 depository, and an acceptable from our perspective
 25 confidentiality agreement, as well as putting the priority
 26 documents that we requested in the depository, or at least in
 27 the process of putting them in the depository.

28 It's unfortunate we have to reach this kind of
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1 point, but sometimes crisis is what brings folks together.

2 But I do want to extend a thank you to their
 3 company representatives, Mr. Bittman and Mr. Starbird, as well
 4 as to the company itself, for the cooperation or level of
 5 cooperation we've seen in the past week-and-a-half or so. It
 6 has been a refreshing change from what we have seen from many of
 7 the market participants up until now.

8 So, we appreciate that very much. We hope that
 9 level of cooperation continues.

10 Mr. Drivon, did you want to add something?

11 MR. DRIVON: Yes, there is one further point
 12 which Mi rant does understand, and that's that a final formal

13 approval of the form of confidentiality agreement that we've
14 entered into requires that it be reviewed in its final form by
15 Legislative Counsel, and that the signature of Mr. Schmidt be
16 obtained prior to its becoming fully executed.

17 CHAIRMAN DUNN: Understood. We stated that
18 pretty clearly last time, and we've been operating under that
19 premise and involving Leg. Counsel along the process here.

20 Let me open it up. If any of the Committee
21 Members have any questions, or Mr. Starbird or Mr. Bittman, if
22 you want to make any additional comments. I suspect this is one
23 of those, when you're ahead you remain quiet.

24 If any of the Committee Members wish to ask any
25 questions of either Mr. Drivon or the representatives from
26 Mirant, they are welcome to do so.

27 If not, at the end of the process today,
28 Mr. Drivon, we will be making a motion covering all the matters
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1 that we heard, but certainly the motion will be made based upon
2 your recommendations to the Committee as to Mirant.

3 With that, Mr. Drivon, anything further as to
4 Mirant?

5 MR. DRIVON: Not with respect to Mirant.

6 CHAIRMAN DUNN: I continually mispronounce it,
7 Mirant. My apologies, by the way.

8 MR. DRIVON: One of us is mispronouncing it,
9 Senator. I'm not certain it's you.

10 CHAIRMAN DUNN: I suspect it probably is me
11 that's all right.

12 Let's move on to Enron. This will probably take
13 a little bit longer because I think we do have a witness that
14 will be testifying. Let me explain how we're going to handle
15 this, basically the same way. I want to make some preliminary

16 comments, then open it up to Mr. Drivon.

17 We're going to invite Mr. Kirby. I suspect,
18 Mr. Kirby, you'll want to make some comments? Or you don't
19 know? You'll assess it?

20 MR. KIRBY: I do, your Honor.

21 CHAIRMAN DUNN: I've never been called your Honor
22 before, but I appreciate that.

23 Anyways, so we'll go from my opening comments.
24 Of course, if any of the Committee Members wish to comment,
25 they're welcome to do so as well, to Mr. Drivon or Mr. Kirby,
26 who is legal counsel for Enron.

27 The only introductory comment I want to make,
28 just so everybody is aware, there's been some rumored whispers
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1 around.

2 In fact, Enron did initiate litigation against
3 the Committee this morning at 8:58, to be exact, in the
4 Sacramento Superior Court here, obviously, in Sacramento. We're
5 not here this morning to comment upon that, to debate it. That
6 process will unfold as is required according to the rules of
7 litigation.

8 But for those of you that are interested in it, I
9 will give you the caption number and case number in case you so
10 desire. It is entitled, "Enron Corporation, Plaintiff, Versus
11 Senate Select Committee to Investigate Price Manipulation of the
12 Wholesale Energy Market; and Senate Committee on Rules." It is
13 Sacramento Superior Court Case Number 01A, as in Apple, S as in
14 Sam, 04141: 01AS04141. The file stamp date this morning is
15 July 11th at 8:58.

16 Mr. Kirby was gracious enough to provide the
17 Committee with several copies. We're trying to make additional
18 copies to give to Committee Members. There are many exhibits

19 attached to it. We'll try to get those out as quickly as
20 possible. We'll try to make available copies of the complaint
21 itself, as opposed to the exhibits, upon request. Again, we
22 sometimes get burdened by those requests, and we may ultimately
23 have to defer everybody to the Sacramento Superior Court who
24 wish to have that.

25 The complaint that was delivered to me was also
26 accompanied by a cover letter from Mr. Kean, who is Executive
27 Vice President and Chief of Staff from Enron Corporation,
28 Houston, a company cover letter.

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1 Again, I want to reiterate, this is a lawsuit
2 that, among other things, attempts to terminate the
3 investigation based on the arguments advanced by Enron, among
4 other things. We are not here to comment on it or debate it.
5 We're here to discuss the continuation of the last hearing.

6 MR. KIRBY: Your Honor?

7 CHAIRMAN DUNN: Yes, Mr. Kirby.

8 MR. KIRBY: There is no request in that lawsuit
9 to terminate this investigation. That is not what the lawsuit
10 seeks.

11 CHAIRMAN DUNN: We are still reviewing it,
12 Michael, and we will obviously be -- all right.

13 So, let's continue forward. I just want to make
14 sure that everybody's aware of that so we can move that issue
15 aside here, because that's not what we're here to debate this
16 morning. That will be handled in due course.

17 Mr. Drivon, we are back to you. Update us with
18 respect to the dealings of the Committee with Enron.

19 MR. DRIVON: Yes, and I appreciate Mr. Kirby's
20 acquiescence to the point and withdrawal of any indication
21 within his complaint that challenges the jurisdiction of this

22 Committee to hold this investigation.

23 On 06-28, Enron forwarded a response to the
24 subpoenas to the Committee, raising numerous objections. That
25 response was delivered to us before 1:30 in the afternoon, but
26 after this Committee had convened its proceeding. They objected
27 to the Committee's jurisdiction to hold the investigation,
28 claiming exclusive jurisdiction was under the Federal Energy

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1 Regulatory Commission to conduct such an investigation.

2 Additionally, they asserted that documents
3 located outside the State of California are beyond the
4 jurisdiction of this Committee's ability to compel production.

5 They further objected that this Committee's
6 investigation and subpoena is related to the Attorney General's
7 investigation which is fatally and irreparably compromised by
8 the blatant public bias and hostility which the Attorney General
9 has displayed himself concerning Enron and its officers.

10 On the 28th, after the hearing, and a full report
11 by myself of what had occurred with respect to Enron in the
12 period of time leading up to the Committee hearing, Senator
13 Morrow moved to find Enron and Mirant in contempt for their
14 failure to comply with the legislative of subpoena process,
15 thereby initiating the process by which contempt could be found
16 by this Committee and ultimately by the Senate.

17 The next day, I was called by counsel for Enron,
18 Mr. Kirby. And Mr. Kirby and I discussed the upcoming Committee
19 process. And Mr. Kirby reiterated to me in a lengthy
20 conversation his concerns with respect to the process, the
21 jurisdiction of the Committee, our ability to obtain documents
22 from his company, and in general that the process had been
23 unfair with respect to his client.

24 On the 3rd, we sent a letter summarizing the

25 proceedings I've talked about before. On the 3rd again, we had
26 the conference call I talked about with respect to Mirant, also
27 including representatives of Enron.

28 On the 5th, we sent the letter I talked about₂

1 concerning modifications to the prior letter that had gone
2 ought.

3 On the 6th, we sent a letter by e-mail, fax, and
4 U.S. mail advising Enron that the hearing on the 10th would be
5 continued to do the 11th in this room, and we sent the
6 information notice to the other market participants with respect
7 to continuing their matters until the 18th.

8 I was contacted by Mr. Kirby, who, on the 9th,
9 who initially left a message for me on my cell phone, and I
10 attempted to call him back. He was at that time, this being
11 about two minutes after the message hit, he was at that time on
12 the telephone with staff in our office, indicating that he had
13 been informed by Mr. Kleinman, representing Duke, that there was
14 no hearing with respect to any of the people this week, and that
15 he received that communication on Saturday and had assumed,
16 based on the communication from Duke's attorney, that there
17 would not be a hearing this week.

18 I did talk to him that morning directly on the
19 phone. I know that he was informed by staff that his reliance
20 on the communication from the Duke attorney had been misplaced,
21 and that his reliance should have been placed on the direct
22 communications from our office that were sent to him by fax,
23 e-mail, and U.S. Post Office.

24 He and I again during the, I believe, two
25 telephone conversations on that day, discussed in detail his
26 client's concerns with respect to the process, jurisdiction,
27 ability of the Committee to proceed, and other matters such as

28 that.

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1 On that date, I sent him a letter memorializing
2 our recent conversations and correspondence, and indicating that
3 he had also, by the way, asked for a continuance until next week
4 for Enron. I in my letter indicated to him that it was not my
5 place to grant continuances on behalf of the Committee, but that
6 I could make a recommendation. My recommendation was that his
7 request be denied, and it was.

8 We communicated that information to him, and he
9 was informed that his client would be -- his client's matter
10 would be considered this morning by this Committee.

11 He had informed me on the 9th -- actually, I
12 think before that, on Friday, that it was his company's
13 intention to produce somewhere in the neighborhood of 25,000
14 pages of documentation, representing some of the documentation
15 accumulated by Enron within the State of California, and that he
16 intended to produce that on Monday.

17 On Monday, he indicated that by reason of having
18 relied upon Mr. Kleinman, that he had called off the people who
19 were going to work the weekend to produce those documents to us
20 on Monday, and so, they weren't produced on Monday, and they
21 haven't been produced up until the time of this hearing, as far
22 as I know; although, since I've left the office, I don't know
23 what may have happened in that regard.

24 On the 10th, that's yesterday, I had several
25 conversations, as I recall, with Mr. Kirby concerning his
26 company's objections and concerns with respect to jurisdiction,
27 production of documents, and the manner in which his company was
28 being treated and singled out with respect to this procedure.

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1 Yesterday afternoon, you had a personal

2 conversation of some considerable length, I believe, in the
3 neighborhood of twenty minutes, directly with Mr. Kirby, where I
4 understand the same objections were made, the same concerns
5 expressed, and the same allegations put forward relative to his
6 impression that his client had been differently and unfairly
7 treated by this Committee. He requested again of you that the
8 matter be continued until next week for his client.

9 You spoke with me concerning that conversation
10 following the termination of it. We discussed the matter, and I
11 was instructed to call him back and inform him that there would
12 be no continuance, and that the matter would be taken up on the
13 basis set forth in the prior letters that I discussed
14 previously.

15 At 8:00 -- last night, during a couple of the
16 conversations that we had with Mr. Kirby, we were informed that
17 his client was inclined to file a lawsuit against us. We asked
18 for a copy of that complaint at that time so that we could have
19 an opportunity to see it. We were not provided with a copy of
20 that complaint until it had been filed this morning.

21 We were informed last evening about 5:30 or 6:00
22 o'clock that they still intended to make that filing, and this
23 morning we received notification, shortly after 9:00 o'clock,
24 that at 8:57, the Committee had been sued in Sacramento Superior
25 Court.

26 You obtained copies of that complaint from
27 Mr. Kirby sometime around quarter to ten this morning. And that
28 is the status.

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1 As of this time, Enron has not signed a
2 confidentiality agreement, spoken with me separately concerning
3 the specific provisions of a confidentiality agreement, at least
4 since the last hearing. They have not assigned a document

5 depository protocol. They have not signed the access agreement.

6 They have not agreed to sign a nondestruct order,
7 and we have as yet not received their document retention/
8 destruction policies, other than as reference in a letter by
9 them to the effect they would not turn the document
10 destruction/retention policy over to us until they had a
11 confidentiality order because they considered that particular
12 document to be of a confidential nature.

13 CHAIRMAN DUNN: Okay. Before any recommendations
14 are made or suggested, what I would like to do is, Mr. Kirby, I
15 want to invite you up.

16 As he's settling in here, I think it looks like
17 we're going to have a few, you may want to shift to a different
18 chair, Mr. Drivon.

19 Mr. Drivon, I want to note also for the record
20 one of the primary objections of Enron, which I'm sure Mr. Kirby
21 is probably going to start with right out of the box, is the
22 claim for a ruling on their objections which were provided to
23 this Committee on the day of the June 28th hearing.

24 The Chair is prepared to make recommendations as
25 to those objections, but certainly let's open it up first to
26 Mr. Kirby, after I go through the objections, one by one. A
27 little bit later, certainly, Mr. Kirby, you're welcome to make
28 further comment. But as with all witnesses, Mr. Kirby, we've₂

1 got to do our duty over here.

2 MR. KIRBY: Your Honor, I was told by Mr. Drivon
3 that I was not a witness, that I was an attorney appearing here
4 today.

5 CHAIRMAN DUNN: I don't want to go counter to any
6 agreements with Mr. Drivon here.

7 MR. DRIVON: To the extent that Mr. Kirby is

8 appearing here as an attorney, it would be my recommendation
9 that he be handled in the same way as was Mr. Bittman at the
10 last hearing and not be sworn.

11 CHAIRMAN DUNN: Okay, we will do that. If you're
12 going to verge into actual factual commentary, Mr. Kirby, we'll
13 put you under oath. But as we did with Mr. Bittman, we'll rely
14 on your duty as a lawyer in the State of California.

15 MR. KIRBY: And an officer of the court, your
16 Honor, which I recognize.

17 CHAIRMAN DUNN: Okay, great.

18 Mr. Kirby, we open it up to you.

19 MR. KIRBY: Thank you, your Honor, and I
20 appreciate the opportunity.

21 I'm going to go out of order here because I want
22 to address -- and I do not, as the Court indicated -- I keep
23 referring to you -- I'm so used to judges, your Honor.

24 The lawsuit that was filed, and I want to make it
25 clear because this happened yesterday. At approximately 11:30,
26 I had a conversation with Mr. Drivon. And I asked the specific
27 question, because these objections that I'm going to get to have
28 never been considered or ruled upon. I asked the question of
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1 Mr. Drivon: Is it the Committee's position that Enron has to
2 file a lawsuit to avoid any waiver arguments?

3 His response was no, that in his opinion, a
4 lawsuit would be premature.

5 I asked him also the question about: Was it his
6 position that Enron had to file a lawsuit to preserve its
7 position with respect to contempt?

8 And his -- at that point, Senator, he said that
9 he had not discussed the issue with you. He would confer with
10 you.

11 So, as of noon yesterday, the position was that
12 there would be no waiver of any kind, and it would be premature
13 for Enron to file a lawsuit.

14 Within the hour I got call back. In fact, I got
15 interrupted on another call. Mr. Drivon wanted to talk to me.
16 He said he had conferred with the Committee, and what he had
17 said about a lawsuit being premature was not the Committee's
18 position, and that I needed to, if I wanted to avoid any waiver
19 arguments, I needed to file a lawsuit.

20 That's why the lawsuit was filed this morning, to
21 preserve it.

22 As of noon yesterday, we were told a lawsuit was
23 unnecessary and one was not going to be filed.

24 So, I want to address that sequence of events,
25 your Honor.

26 CHAIRMAN DUNN: Before you do that, Mr. Kirby,
27 let me throw on a comment, too, for clarity, because Mr. Drivon,
28 after that conversation, did in fact talk to me.

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1 The concern, at least from the Chair's
2 perspective was, we obviously can't provide you and your client
3 legal advice. I know you were not seeking it from us. And so,
4 our position was, you've got to do whatever is necessary,
5 obviously.

6 We haven't deemed anybody's objections waived
7 along this process.

8 So, maybe there's a point we can resolve the suit
9 that was filed this morning.

10 MR. KIRBY: I think that's true, your Honor. I
11 mean, that's the only reason that this -- I want to make this
12 clear -- the only reason this case was filed was because I got
13 the distinct message yesterday afternoon that we were in danger

14 of waiving certain arguments if the complaint was not filed.

15 And as to getting the copy of the complain, I
16 think the Court -- I'm going to keep referring to you as the
17 Court, your Honor.

18 CHAIRMAN DUNN: We understand.

19 MR. KIRBY: Perhaps you've been elevated; perhaps
20 not.

21 CHAIRMAN DUNN: I'm not going to comment.

22 MR. KIRBY: That was not -- your Honor, we have
23 indicated a willingness to sit down on the issues, but the Court
24 -- the Chair asked if we would supply a copy of the complaint.

25 Having been told at noon that I'd better get a
26 complaint out before 10:00 o'clock, that complaint was finished
27 late last night. I arrived here approximately 11:00 P.M. and it
28 was filed this morning. And as soon as it was filed, it was

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1 brought over to the Court.

2 CHAIRMAN DUNN: Yes, I understand that. I'm not
3 being critical of you for not providing us a preliminary copy
4 yesterday. You told me you'd have to check with your client but
5 it might be difficult to do so.

6 MR. KIRBY: Thanks, your Honor.

7 The other thing that I stated in response is, the
8 lawsuit is not a lawsuit no stop this Committee's entire
9 investigation. That's not the lawsuit, and it's not pleaded in
10 that fashion. I appreciate you've not had an opportunity, but I
11 want to make clear that Enron did not bring a lawsuit to cease
12 this Committee's entire activities in any respect.

13 The question is, there are certain jurisdictional
14 objections to the subpoenas. There are clear rights of due
15 process which we submit have not been honored, and the lawsuit
16 seeks a declaration that we are entitled to those rights.

17 And again, I am willing to address those.

18 CHAIRMAN DUNN: My fellow colleague, Senator
19 Peace.

20 SENATOR PEACE: Mr. Chairman, I had thought it
21 was a good admonition on your part that this hearing would not
22 be on the lawsuit.

23 However, if counsel insists on characterizing his
24 lawsuit, I think that it's incumbent upon us to respond to what
25 I would frankly view as a gross mischaracterization of the
26 lawsuit I have in front of me.

27 The very first statement is an assertion of
28 exclusive jurisdiction by FERC.

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1 Now, it's a wonderful irony that you also attach
2 to this lawsuit asserting exclusive jurisdiction by FERC a
3 letter signed by Mr. Kean which virtually argues the exact
4 opposite with respect to Enron's alleged lack of culpability,
5 and state regulatory agencies, and whatnot, having made all the
6 mistakes.

7 MR. KIRBY: Senator, could I point you -- I don't
8 want to get off on the lawsuit -- but in fairness, if you want
9 to look at Paragraph Seven and Eight of the complaint, it says
10 very specifically that these issues regarding FERC jurisdiction
11 have been raised, fully briefed and argued before United States
12 District Judge Robert Whaley in the MDL proceeding. And Enron
13 specifically pleads, Senator --

14 CHAIRMAN DUNN: Mr. Kirby, which page are you on?

15 MR. KIRBY: I'm sorry, Page Four, your Honor,
16 Paragraph Eight.

17 The issues involving FERC's exclusive
18 jurisdiction are the exclusive province of federal courts and
19 cannot be raised here. That's the point I'm making, Senator.

20 This lawsuit does not raise those issues because
21 they cannot be raised in that forum. I want to make that clear.

22 SENATOR PEACE: In your prior letter, and in your
23 pleadings, you argue that this Committee lacks jurisdiction
24 because FERC has exclusive jurisdiction.

25 You also mischaracterized, and I'm glad you
26 brought attention to Paragraphs Seven and Eight. If I were in
27 your shoes, I wouldn't, because you mischaracterize that case as
28 well.

3

1 That case was decided merely for lack of
2 standing. In fact, I argued against filing of that case. There
3 is no final adjudication on that issue. And we can talk about
4 that and argue that --

5 MR. KIRBY: Paragraph Seven and Eight don't refer
6 to the lawsuit.

7 Are you referring to Senator Burton's lawsuit?

8 SENATOR PEACE: Your contention in this document,
9 which you may for public relations purposes want to disclaim,
10 Enron's clear position to deny this Committee's jurisdiction.

11 Your basis of the -- and I've read through the
12 complaint very quickly -- it is basically this. There's
13 exclusive jurisdiction at FERC, and the documents that this
14 Committee is asking for do not go to any reasonably contemplated
15 legislative agenda, which you contend must constrain any kind of
16 subpoena power which this Committee may have.

17 Now, one of the bills moving through this
18 Legislature would make certain activity by marketers and/or
19 generators a criminal act. And I would suggest that it
20 certainly would be within the confines of this Legislature to
21 get information associated with what kind of behavior occurred
22 or didn't occur before it considered whether or not it should

23 make certain actions criminal or not criminal.

24 Now, I may not even be one who thinks that's a
25 particularly good idea. But one really has to jump off just
26 question here. When you contrast Enron's behavior with all the
27 other folk, particularly since, as your principal points out in
28 his letter, that you're such a small participant allegedly in₃

1 the market, with only \$39 million at stake, your client doth
2 protest too much.

3 One can only ask, what do you have to hide? Why
4 does Enron seek so stridently to be contrasted by all the other
5 companies? Why does Enron so stridently resist looking at these
6 documents?

7 It's interesting, particularly since you
8 allegedly have so little at stake.

9 It's also interesting because you attached
10 yourself to the effort to attempt to publish the Department of
11 Water Resources purchasing, and then you hid behind that in your
12 prior letter to this Committee, saying that, well, now that the
13 Judge in San Diego has said that the state has to reveal all of
14 these documents, this is another reason why Enron can't give
15 these documents up to the Committee because we can't rely on the
16 state to keep them confidential, because the Court may order you
17 to make things you otherwise agree to in a confidentiality
18 agreement, to go public.

19 And yet, Enron was behind the effort to make
20 those documents public.

21 You are very smart people. I will give you that.
22 Nefarious and smart.

23 MR. KIRBY: Senator, can I address the --

24 CHAIRMAN DUNN: One moment.

25 Mr. Drivon.

26 MR. DRIVON: Your Honor --.

27 [Laughter.]

28 CHAIRMAN DUNN: Could we find a black robe around ³

1 here?

2 Go ahead, Mr. Drivon.

3 MR. DRIVON: I actually do know the difference.

4 I need to clear up one thing. To the extent
5 that Mr. Kirby may have created the impression that we urged him
6 to file a lawsuit, that is not accurate.

7 What the conversation was, was that although we
8 did not believe such a lawsuit necessary, he needed to do
9 whatever he needed to do to protect his client.

10 The decision to file a lawsuit was -- was Enron's
11 decision. It was not suggested by us. It was not commanded by
12 us, and it was not conveyed to them as necessary by us.

13 CHAIRMAN DUNN: Okay, which I think my comments
14 were intended to indicate before, that we weren't taking a
15 position. They had to do what they had to do.

16 Mr. Kirby, I know you want to respond to Senator
17 Peace.

18 MR. KIRBY: Your Honor, we could debate that
19 issue all day.

20 CHAIRMAN DUNN: Which is what I'm trying to say
21 here.

22 If you want to respond to Senator Peace,
23 certainly we're happy to give you that opportunity. But I want
24 to get focused in on what we're here about. We'll deal with the
25 complaint, as I said before, in due course.

26 MR. KIRBY: I do, too, your Honor. And I think
27 as we go through that, and as we talk about the objections in
28 this hearing, you'll see that Enron is being treated

1 differently. And Enron is not making objections that other
2 market participants are not also making.

3 And other than -- I came here this morning, and
4 it's the first time I've heard the agreement with Mirant.
5 Obviously don't know what it -- the contents of it.

6 I would only point out that the same proposal was
7 not submitted to Enron.

8 Your Honor, I want to talk about -- my
9 understanding is that this hearing today is to be a hearing on
10 the objections by Enron to the subpoena duces tecum which was
11 served on June 12, 2001.

12 Did we respond differently to the subpoena? The
13 answer is no. As the Court in referencing, and Mr. Drivon, in
14 referencing the conduct of Mirant, my understanding, your Honor,
15 nearly everyone if not all of the participants submitted written
16 objections on June 28th to the subpoena. That time had been
17 extended in writing, signed by Mr. Drivon, and it was originally
18 to be at one -- if the Court will recall, excuse me.

19 The subpoena called for production at 1:30 P.M.
20 on June 21st. Mr. Drivon signed a letter that said all market
21 participants would have a seven-day extension.

22 CHAIRMAN DUNN: That's correct.

23 MR. KIRBY: That would extend the time to 1:30 on
24 June 28th.

25 In fact, and I remember, and I commented to
26 Mr. Drivon about it, when the hearing was held on the 28th, and
27 there was a suggestion that Enron hadn't even contacted or dealt
28 with the Committee, Mr. Drivon corrected -- in fact, I think it

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1 was he corrected Senator Peace and said that I had called him
2 and told him. And even when Mr. Drivon said the hearing has

3 been advanced from 1:30 to 11:00, those objections in response
4 were faxed before 11:00 o'clock.

5 We have never, your Honor, at this point -- I'm
6 just going to keep calling you "your Honor". I can't stop it.

7 CHAIRMAN DUNN: Don't worry about it. We will
8 stipulate that the record, every time there's a reference to
9 "your Honor" you mean the Chair, or fellow Committee Members.

10 SENATOR MORROW: Don't think we're going to do
11 it.

12 [Laughter.]

13 CHAIRMAN DUNN: Believe me, I'm operating under
14 no false pretenses, Senator Morrow.

15 MR. KIRBY: Senator Dunn, despite the objections
16 that have gone back as forth, and the conversations, and I think
17 it was clarified with Mr. Drivon, there really is, when you get
18 down to Enron's response to the subpoena duces tecum, there are
19 really three basic issues.

20 One is confidentiality. And I say that, your
21 Honor, without waiving the FERC objections, but the Court --
22 excuse me -- the Chair has already indicated what its position
23 is on the FERC objection. We have made it. We have preserved
24 it, but that issue is not going to be decided here.

25 And I want to make it clear so that Senator Peace
26 is aware of this, we have never said despite our FERC
27 objections, we will not turn over a single document. That's
28 never been our position.

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1 There are serious issues of confidentiality, and
2 I don't think anybody that has dealt with Mr. Drivon or any of
3 the market participants would deny that. As the Chair knows,
4 there have been two long exchange sessions, and I know Ms.
5 Montgomery was involved in, where draft protective orders went

6 back and forth. In fact, there were discussions about whether
7 that protective order should be in the state court or the
8 federal court.

9 And you got to the point where it looked like in
10 the discussions with counsel there was going to be a protective
11 order that would adequately deal with those issues.

12 And then the Committee elected that they did not
13 want to go forward with that.

14 And I understand now that there is apparently a
15 confidentiality agreement that is at least acceptable to
16 Mirant. I haven't seen the form signed by Mirant.

17 The second issue, your Honor -- so, there is a
18 huge issue, and because those are confidential, and the point
19 that I make is, it cannot be seriously contended that Enron is
20 making a frivolous argument about confidentiality of pricing
21 data and forward contracts when the Governor of this state and
22 the Attorney General of this state, as you will see in the
23 attachments to this lawsuit, three expert witnesses have filed
24 declarations in San Diego Superior Court on behalf of the
25 Governor and the Attorney General, arguing as experts, that this
26 information is highly sensitive; it is highly confidential, and
27 it should not be disclosed.

28 Our point is, we agree with their position, that
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1 it is confidential. And those issues need to be dealt with.

2 That's the issue of confidentiality.

3 The second issue, your Honor, is the
4 jurisdictional -- let me take the third issue, because I think
5 Mr. Drivon and I are in agreement on this.

6 The issue, the legal issue is whether or not a
7 Senate committee can require a custodian of records in Houston,
8 Texas to come to California and testify.

9 Mr. Drivon, and he is free to speak his position,
10 but I think agrees with me and our brief that no, you cannot.
11 It is clear in California law, a California Superior Court
12 cannot require that.

13 So, the custodian cannot personally be
14 compelled. That's one of our objections, and I don't think the
15 Committee's legal analysis disagrees with that, but that's part
16 of my problem, your Honor.

17 To this day, I have submitted my objections. I
18 have submitted a 12-page brief with I think it's at least 10
19 cases, statutes. I have never ever seen a legal argument, an
20 authority, a case, even a letter saying this is our legal
21 position, which I'm going to get to.

22 The third issue, your Honor, and I think as you
23 and I talked yesterday, the issue is: How far does the subpoena
24 power of a Senate committee extend, and does it extend --
25 specifically, does it extend beyond the state borders of
26 California? That is, pure and simple, a legal issue.

27 I think, Senator, you and I and Mr. Drivon are in
28 agreement. There has never been a case in the history of

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1 California jurisprudence that has decided that issue. It is a
2 question of first impression.

3 Certainly I believe from the brief that we've
4 done is that the case law suggests that subpoena powers do not
5 extend beyond the state borders. And that's the issue, your
6 Honor.

7 And the problem that we have had from Enron's
8 perspective is, even up to the letter that you sent, your Honor
9 -- Mr. Chairman -- on July 5, the Committee --

10 CHAIRMAN DUNN: Let me interrupt you.

11 Senator Johannessen.

12 SENATOR JOHANNESSEN: I am very interested in the
13 issue of the subpoena power and the state borders.

14 Isn't there ample evidence that subpoena powers
15 can go beyond state borders on other issues, or is this
16 something specifically for this issue?

17 MR. KIRBY: Your Honor, there has never been, to
18 my knowledge, at least I've not been provided with any legal
19 authority from the Committee or its counsel, any case that has
20 ever said that subpoena powers can go -- a state's subpoena --
21 and I think as the Court, the panel, will recognize, almost all
22 of these cases, obviously, arise in the context of court cases
23 as opposed to Senate proceedings.

24 But the general rule in our view is, a state
25 proceeding in California, as contrasted, Senator, with a federal
26 proceeding, a state proceeding's subpoena powers extend to the
27 state border.

28 Now, a different set of rules may apply when 3

1 there is a civil lawsuit between two parties. Then that's -- I
2 don't want to get -- if the Court wants to hear it, but we have
3 cited, there's a very clear reported case, the Amoco case, where
4 insurance companies were sued -- out-of-state insurance
5 companies were sued in California. Clearly, in the pretrial
6 discovery process, you could require them to bring documents and
7 subject people out-of-state to depositions.

8 But when the attempt was made to have them
9 produce out-of-state residents to testify in a California court,
10 the Court of Appeals in Amoco and the California Supreme Court
11 denied review; said Section 1989 of the Code of Civil Procedure
12 means exactly what it says. A witness is not obliged to appear
13 unless he or she is personally served in the state or is a
14 resident of the state when they're served.

18 At this point, and I want to go through this
19 history for you, Senator, that's the process.

20 SENATOR JOHANNESSEN: You don't need to go
21 through the history.

22 But I would like to have response from our
23 counsel on the subpoena powers of the state.

24 CHAIRMAN DUNN: Senator Bowen, did you want to
25 insert?

26 Senator Johannessen, let's hold your question for
27 a second because I was going to ask Mr. Drivon for a response as
28 well.

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1 SENATOR BOWEN: On the same point, because I have
2 read just again now the legislative subpoena power. And the
3 suggestions that Mr. Kirby makes are nowhere to be found in the
4 statute. There's nothing dealing with any of the matters that
5 he raises.

6 This is a very simple, very short statute that
7 we're dealing with. It says.

8 "If any witness neglects or
9 refuses to obey a subpoena, or
10 appearing neglects or refuses
11 to testify or to produce upon
12 reasonable notice any material
13 on proper books, papers, or
14 documents in his possession or
15 under his control, he has
16 committed a contempt."

17 It doesn't say anything about getting a retired
18 judge to decide a bunch of claims. There's nothing like that in
19 the statute.

20 MR. KIRBY: Senator Bowen.

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21 CHAIRMAN DUNN: Hold on, Mr. Kirby, if you would.
22 Let's go to Senator Peace.

23 SENATOR PEACE: Having been around this place for
24 19 years, this is not the first time I have witnessed the severe
25 disadvantage well-qualified and experienced courtroom lawyers
26 have appearing in the Legislature.

27 MR. KIRBY: Is that a grant of immunity, Senator.
28 [Laughter.]

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1 SENATOR PEACE: And I want to tie back to the
2 comment that you made at the outset, where you felt that Enron
3 was being treated differently.

4 Enron hasn't been treated differently than any of
5 the companies here. You have argued your case differently than
6 the other companies.

7 MR. KIRBY: Can I address that?

8 SENATOR PEACE: Let me finish.

9 That may have been because of a policy position
10 which Enron takes that's different than the other companies, or
11 it may just have been a question of style.

12 But if we go back to the last hearing, you were
13 the only company who came with a letter asserting exclusive FERC
14 jurisdiction in a very confrontational way, making reference
15 specifically to -- and I thought in an incredibly ironic way --
16 the San Diego Judge's decision compelling the disclosure of the
17 state purchasing records, which I hope you can appreciate from
18 our perspective. When the private companies say, we have to
19 keep all our documents secret, but the state has to publish
20 theirs, it's sort of a pretty obvious effort, it seems to us, on
21 the part of the private players to put the state purchasers at a
22 competitive disadvantage.

23 I don't think the press has understood that very

24 well, which is why I keep coming back to making the point again.
25 And they have been the un -- in my view -- the unwitting allies
26 of those that have exploited this market. They didn't do it on
27 purpose, but they've done so.

28 Now, you are treading, if I may dare, with your
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1 lawsuit, and with the position that Enron is taking, into far
2 more significant ground than anything that has to do with
3 energy. You're treading into the territory of asking a court to
4 make judgment on the rules and the law governing the rights of
5 the Legislature. It is a separation of powers issue of the
6 highest order.

7 I hope you're prepared to go to the United States
8 Supreme Court if you get any success. And I can't imagine the
9 tumult and the seriousness of the institutional crisis that
10 would be precipitated by a Houston company, hiring a San Diego
11 lawyer, to precipitate a conflict between the California courts
12 and the California Legislature. This is a big deal.

13 And when Enron decides it's so important to keep
14 their behavior secret that they are willing to precipitate a
15 Constitutional conflict between the two branches of government,
16 I can only assume that there's much more there to find than I
17 ever imagined.

18 Now, I also understand why Enron would want to
19 assert the exclusive jurisdiction of FERC. As the largest
20 nonfederal government employer of former FERC employees and
21 commissioners, Enron has a lot of confidence in how it will
22 prevail at FERC.

23 MR. KIRBY: May I respond?

24 CHAIRMAN DUNN: Mr. Kirby.

25 MR. KIRBY: I want to respond to both Senator
26 Peace and Senator Bowen.

27 That's why I wanted to clarify it this morning.
28 I understood, Senator Peace, that we did not need to file a 4

1 lawsuit to preserve Enron's objections. I understood that up to
2 noon yesterday. And I will be very specific on the conversation
3 that I had, Senator Peace. I asked --

4 SENATOR PEACE: Forget the lawsuit. You asserted
5 these defenses in your letter last week, and that was a
6 different position than what all the other companies asserted.

7 So, I do not let stand for one millisecond your
8 absolutely false assertion that this Committee has in any way
9 treated Enron any differently than anybody else.

10 Enron has treated this Committee differently than
11 all the other companies have.

12 MR. KIRBY: That is not true, Senator, and I will
13 address --

14 SENATOR PEACE: Then why --

15 MR. KIRBY: Can I address that, please.

16 Reliant Energy, not the single endeavor, Reliant
17 Energy sent a letter on June 28th to this Committee and sent
18 written objections. That is precisely what Enron did. Reliant
19 Energy has objected, Senator, to the jurisdictional reach of
20 this Committee --

21 CHAIRMAN DUNN: Before we go on, Senator Peace --

22 SENATOR PEACE: Let's not argue this deja vu.
23 Let me just tell you something.

24 I've read their letters; I've read your letters.
25 And suffice it to say -- and like I say, maybe it's just
26 inartfulness, but for whatever it's worth, to at least this
27 reader, there's a qualitative, substantive difference in the
28 manner in which each of the other companies, even where they 4

1 have aggressively attempted to make their points, have chosen to
2 articulate their position.

3 There was none of the political rhetoric, let's
4 start with that, in the communications. There was none of the
5 references to the San Diego decision on forcing the revelation
6 of the DWR documents.

7 There were no references, personal references, to
8 the Attorney General.

9 None of the diatribe which, quite frankly, with
10 all due respect, your documents were replete with.

11 MR. KIRBY: Senator --

12 CHAIRMAN DUNN: Before you do that, Mr. Kirby, I
13 want to add one thing as well, too. When we get to the
14 objections, which I indicated sometime ago this morning, that
15 the Chair is prepared to make at least recommendations. It's up
16 to the full Committee as to whether they will adopt those
17 recommendations.

18 But as to the issue of Enron and Reliant,
19 Mr. Kirby, as you know, there was a difference that I think in
20 our discussions you discount. You may ultimately be correct,
21 but we don't know the answer to that.

22 And that is, on that day, June 28th, they did in
23 fact provide written objections, but also provided documents.

24 Now their issue, that issue is going to be
25 addressed at our hearing next week as to Reliant and our
26 continued discussions.

27 So, there was a difference, Mr. Kirby. And make
28 sure you accommodate that in your comments because, again, I

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1 know that you have discounted what you assume to be in the boxes
2 produced by Reliant.

3 MR. KIRBY: I don't know what's in the boxes.

4 CHAIRMAN DUNN: I understand that, and I'm not
5 commenting on it, because we have reviewed some but not all. If
6 there are substantive documents in there, which I'll at least
7 have to operate on the premise there's something of substance in
8 there -- my hope is Reliant didn't just give us junk -- that
9 that's a difference. That's a difference. They asserted their
10 objections, yet at least made a step. We're going to examine
11 that step next week, which did differentiate them from Enron.

12 SENATOR BOWEN: Senator Dunn, if I might.

13 I just think that that is critical. What we did
14 last week, I think, was -- or two weeks ago -- we attempted to
15 draw a line between those subpoenas that we had issued where we
16 felt that some good faith response that would lead to an
17 appropriate conclusion was, in fact, under way. And the
18 production of a significant number of documents put us in a
19 position where it would have been inappropriate, in my view, to
20 proceed with contempt, any kind of contempt proceedings, until
21 we had a chance to find out whether we were looking at hot
22 chocolate orders or the kind of information that the Committee
23 had requested.

24 So, there was really not much in the way to
25 discuss about what to do with anyone who had responded, despite
26 continuing objections and concerns about reaching an appropriate
27 confidentiality agreement, with boxes of documents.

28 We had no such assurance that we would get

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1 documents from Mirant. And we have subsequently been able to
2 resolve that issue, and we now have documents.

3 Only Enron has put us in a position where they
4 have argued that the Committee has no jurisdiction, and it's
5 been one objection after another.

6 And this is not a court. It is a legislative

7 proceeding. And the issues are the manner of proceeding and the
8 issues are different. And they are set by this body.

9 Obviously, they have to meet with Constitutional mandates.

10 If you go back to the 1929 cement price fixing
11 case, you will find that the court ruled that while the
12 Legislature has the power to hold someone in contempt, and
13 indeed to jail someone, that the subpoena has to have sufficient
14 particularity.

15 But we have gotten no indication that Enron ever
16 intends to comply with the subpoena. And that's why we're here.

17 MR. KIRBY: Senator, that's not true, and I want
18 to go through the history here, because in the Chair's letter of
19 July 3 and 5, the Chair made it very clear that the Committee's
20 position was, to avoid contempt, you must waive all objections
21 except as to confidentiality and trade secrets. That's in a
22 letter of July 3; it's in a letter of July 5.

23 I had a conversation with Mr. Drivon, and I
24 appreciate we put a lot on him, given the narrative, but on
25 Friday, July 6th, I said to Mr. Drivon, "Look, Enron is
26 assembling documents and is going to produce documents, but I
27 need to have an agreement with you that if I start producing
28 documents on behalf of Enron, I am not going to waive all of my⁴

1 objections." And he confirmed that we would not be penalized
2 for -- I think that was his comment.

3 I sent him a letter, it's Exhibit 22 to the
4 complaint, which says that we have reserved our objections, and
5 we have now rented a repository in Sacramento. We have some
6 30,000 documents to be produced. And as Mr. Drivon accurately
7 stated, we had people working with this weekend. I got -- and I
8 don't think we need to spend a lot of time on it, and I don't
9 ascribe it's anybody's fault -- I did get an e-mail, as did

10 everybody else that's in this marketing generator group, on
11 Saturday, saying in unequivocal terms from Mr. Kleinman that he
12 had talked to Mr. Drivon; there were no hearings this week,
13 which I stopped people working on the weekend. And Mr. Drivon
14 has explained what happened, and it was obviously a
15 miscommunication.

16 But we are assembling documents.

17 SENATOR BOWEN: You'll have to help me because I
18 don't have any of the exhibits.

19 MR. KIRBY: I apologize, Senator.

20 SENATOR BOWEN: So, when you refer to Exhibit 22,
21 I don't have any idea what that is.

22 MR. KIRBY: If you look at the second paragraph
23 of my letter of July 6th to Mr. Drivon.

24 SENATOR BOWEN: Gee, I can go back to a previous
25 life.

26 CHAIRMAN DUNN: Is that good news or bad news?

27 SENATOR BOWEN: That's bad news.

28 SENATOR PEACE: While she's getting that,

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1 Mr. Kirby, I tell you, the best face I could put on the events
2 to this day is to go back to your original letter. And if I
3 were in your position, I would say, "You know, in retrospect,
4 Mr. Chairman and Members, maybe we should have been a little
5 less colorful in our communication."

6 MR. KIRBY: Senator, in the interest of fairness,
7 I'd like you -- and this is not reflecting on this Committee,
8 but it is the state's highest legal office -- I represent a
9 corporation which has not been sued by the State of California,
10 has never been charged criminally in any of these matters, and
11 the highest legal officer of this state has suggested that the
12 Chairman of my client should be taken to a prison cell, and all

13 sorts of things.

14 SENATOR PEACE: And Mr. Lay in Spain earlier in
15 the week referred to Mr. Burton as a communist. So am I
16 supposed to take that seriously and get all bent out of shape
17 over it?

18 Okay, so Mr. Burton's a communist; Mr. Lay's a
19 fascist. Let's go on and get things done.

20 I don't think Burton took offense at it.

21 [Laughter.]

22 CHAIRMAN DUNN: Our Republican colleagues --

23 SENATOR PEACE: Give me a break. You guys have
24 played the spike card beyond its relevance. And I'm sure that
25 Mr. Lay, whom I have a great deal of respect for, he's a
26 brilliant man. He obviously wouldn't have gotten where he was
27 if he weren't a brilliant man. But he must have a much tougher
28 skin, and certainly a better sense of humor, than to really take
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1 that comment seriously.

2 And I know that lawyers sometimes are humorless,
3 but I would really urge you to --

4 MR. KIRBY: Present company excluded, Senator.

5 SENATOR PEACE: Well, I urge you to get over that
6 one.

7 CHAIRMAN DUNN: Some shocking revelations are
8 going on in this Committee today.

9 MR. KIRBY: Senator, if the letter offended the
10 Committee, since I wrote it, I would apologize for it. I think
11 that in the context of what was going on at the time --

12 SENATOR PEACE: It isn't about being offended.
13 The letter reflected a very hostile and combative position with
14 this Committee. Whereas, the communications from the other
15 folks, no matter how disagreeable they may have been, they were

16 professional and not laced with political, which is why I've not
17 hesitated from responding politically in this exchange between
18 you and I, because I think you opened that opportunity by lacing
19 your communications with political commentary rather than legal
20 commentary.

21 CHAIRMAN DUNN: Let me, if I can as the Chair
22 here, because I know Senator Johannessen wants to make a comment
23 and Senator Bowen does, but before we do that, I want to provide
24 a little clarification as well.

25 To the best of my knowledge, Mr. Kirby, your
26 comments just now, that you've rented a depository space here in
27 Sacramento and are prepared to put documents in there is news to
28 us. I don't know that you or anybody on behalf of Enron has

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1 advised us.

2 Mr. Drivon.

3 MR. DRIVON: Senator, I was told by Mr. Kirby
4 last week that his client was prepared to produce somewhere in
5 the neighborhood of 25,000 pages of documents; that they were in
6 the process of trying to put together a depository.

7 Today is the first time I have heard that they
8 have been successful in that hunt. And I did not hear him say
9 that that success notwithstanding, that they had, in fact, made
10 a deposit of those documents.

11 I further understand, Senator, that those
12 documents represent documents that were here, present in the
13 State of California, represent no infusion of documents from
14 outside the State of California.

15 And further, would like to point out to you and
16 to the Committee that one of the things that we made clear was
17 that we expected to see here today a custodian of records from
18 the various market participants. We were told that there is no

19 custodian of records in the State of California for Enron. And
20 yet, they have 25,000 documents at least in the State of
21 California, and I don't know who is in charge of, in custodial
22 charge of those documents.

23 I have to presume, Senator, that someone is, and
24 I would further presume that since we've made our position clear
25 in that regard, that person is here today.

26 CHAIRMAN DUNN: Let me make some additional
27 comments here today as well, just following up on the tone
28 issue; although, I don't want our Committee hearing to be drawn
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1 too much farther down this thrust.

2 SENATOR MORROW: Mr. Chairman, before we do that,
3 on that point by Mr. Drivon, if I can raise one issue, the
4 question that's in my mind.

5 As far as these 30,000 documents that you appear
6 willing to be put into a repository, it would be a correct
7 understanding on my part that those -- well, you tell me, would
8 those be made available or not to the Committee, pending the
9 outcome of the lawsuit that you filed?

10 MR. KIRBY: Your Honor -- excuse me, Senator --
11 the lawsuit that was filed was simply to get a hearing on very
12 narrow issues.

13 The lawsuit did not seek --

14 SENATOR MORROW: That's fine.

15 MR. KIRBY: So, the answer to your question is,
16 and I have suggested to Senator Dunn and to Mr. Drivon, I mean,
17 I thought the issues that were raised by the lawsuit could be
18 resolved in some fashion without the necessity of a formal
19 lawsuit.

20 SENATOR MORROW: Are these documents going to be
21 made available to the Committee?

22 MR. KIRBY: The only remaining issue is the
23 confidentiality issue, obviously. As to some of those
24 documents, there are confidentiality issues, as to some of them
25 there are not, Senator.

26 CHAIRMAN DUNN: Let me provide clarification --

27 SENATOR MORROW: The answer is no, until and
28 unless we sign a confidentiality agreement that is amenable to
5

1 you.

2 MR. KIRBY: Senator, if I'm correct, the answer
3 is yes as to some, with or without a confidentiality agreement;
4 no as to others unless and until we have a confidentiality
5 agreement. And I have now looked -- I mean, I've been given a
6 copy and I haven't analyzed the one that you signed with Mirant.
7 Obviously, Senator, in response --

8 SENATOR MORROW: At least the answer is with
9 respect to some of those documents, it's not dependent on the
10 outcome of the lawsuit that you filed.

11 MR. KIRBY: That's correct; that's absolutely
12 correct.

13 CHAIRMAN DUNN: But let me provide some
14 clarification, Senator Morrow, because I think -- Mr. Kirby, let
15 me ask a question which I think will provide more clarification
16 to Senator Morrow's question.

17 The issue as to documents outside of the State of
18 California is one that you want resolved by somebody, whether it
19 be -- I suspect if this Committee resolves it against Enron, you
20 would proceed with your lawsuit to resolve that question. And
21 the documents that are either in the depository, or you are
22 about to deposit in the depository, are California documents,
23 not out-of-state documents; is that correct?

24 MR. KIRBY: That's my understanding, Senator.

25 CHAIRMAN DUNN: I just want to make sure, Senator
26 Morrow, that we don't operate on the assumption that the lawsuit
27 will cease to exist if, in fact, the depository is established
28 and opened up to this Committee. I don't think that's true.

5

1 MR. KIRBY: No, but I've also made it clear --

2 CHAIRMAN DUNN: Mr. Kirby, you made a
3 recommendation to me and I know to Mr. Drivon that you just want
4 some neutral arbitrator to resolve --

5 MR. KIRBY: And it doesn't have to be an
6 arbitrator, your Honor, and it doesn't mean that it couldn't be
7 resolved informally.

8 But the position that I was given yesterday was,
9 I subjected myself to a waiver argument if I didn't file the
10 lawsuit.

11 CHAIRMAN DUNN: That's not quite what we said.
12 We said, you need to do what you believe is appropriate. I just
13 want to make sure. We're not taking a position on that. I don't
14 want to beat that dead horse, so to speak.

15 I want to go back for a moment, Mr. Kirby, to the
16 tone issue and your earlier letter.

17 Senator Johannessen, my apologies, and then we'll
18 go to Senator Bowen.

19 Because we appreciate your comments. It's not an
20 issue that was in need of an apology, but certainly we
21 appreciate your gesture in that regard.

22 But I think the tone that Senator Peace was
23 referring to was reiterated in the letter you provided me this
24 morning from Mr. Kean. And I just want to read a part of it
25 which I think reflects upon the tone issue that Senator Peace
26 has raised. One of the paragraphs says:

27 "Apart from the concerns that

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Enron has about the legality of

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1

the committee's discovery

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requests, Enron is equally, if

3

not more, concerned about the

4

tone and direction of the

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committee's activities. Based

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on those activities, it is

7

exceedingly difficult to discern

8

whether the committee's actions

9

are designed to uncover the facts

10

underlying the price spikes in

11

California's wholesale electric

12

power market, or to create a

13

convenient political scapegoat to

14

shoulder the blame for California's

15

policy mistakes and changes in

16

market fundamentals. "

17

And he goes on to say that Enron's been singled

18

out, an issue that you have advanced. He goes on to say we

19

haven't zeroed in on the municipal entities.

20

Please tell him he's incorrect about that. In

21

fact, we have gotten documents in response to our request from

22

LADWP. Other municipal entities are also on the receiving end

23

of a request, which will ultimately be turned into subpoenas if

24

necessary. So, he's incorrect there.

25

As well as, he references the Committee has not

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investigated the circumstances that led to three major electric

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utilities, and refers to, why aren't you focusing in on

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utilities? We have made document requests to the three IOUs in

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California. In fact, they were not outside of the scope of the

2 investigation as we determine it.

3 So again, I raise those couple of points in the
4 letter simply because the tone issue was raised by Senator
5 Peace. Even if we ignore your letter, it's still there as of
6 July 11th.

7 SENATOR PEACE: As long as we go to that letter,
8 since obviously part of Enron's agenda is to get this letter
9 sort of into the public que, the one thing I have to give
10 Mr. Kean some credit for here is consistency in the letter.

11 As you indicated in terms of the contemporary
12 issues that he raises, as they relate to this Committee, is the
13 information is inaccurate. He's inaccurate with respect to the
14 historical position as well.

15 You might want to take this question back. You
16 make the contention that this is all in the exclusive
17 jurisdiction of FERC, and I'm going to agree with you. FERC was
18 exclusively in charge of this market.

19 But then Mr. Kean's letter, when you want to take
20 advantage of that truthful statement, every market rule, every
21 market mechanism, how the PX worked, all that stuff was decided
22 by FERC, not by California policy makers, one hundred percent of
23 it. All right?

24 And you want to take advantage of that exclusive
25 FERC jurisdiction to the extent that you feel you'll do better
26 back there. But then, when you want to talk about, well, things
27 went wrong, it was those California policy makers and regulators
28 that did everything wrong.

5

1 Why don't you take that question back to Mr. Kean
2 and have him explain to you how he rationalizes those obviously
3 inconsistent positions.

4 And while you're at it, because obviously you
Page 50

5 weren't on this train during this thing, let me take us back
6 four years ago.

7 CHAIRMAN DUNN: If you can do it briefly, Senator
8 Peace, because we want to establish a quorum.

9 SENATOR PEACE: In these last assertions of
10 Enron's positions, what he doesn't tell you is that it was Enron
11 that invented the concept of a separate ISO and PX. It is Enron
12 that's still pushing that in Japan today, as we speak. It is
13 Enron whose Chairman was in Spain, pushing the same concept of
14 separation of generation and transmission.

15 It was Ken Lay, as a bureaucrat in the federal
16 government, who began the whole concept of the competitive model
17 being dependent upon the disaggregation of the parts.

18 And you know, Mr. Lay ought to take some pride in
19 that notion of how to move forward, because he's spread it
20 throughout the world.

21 Now, let me to go the final piece of this. You
22 make reference -- in this letter you also make reference, and
23 interestingly enough, relies upon press reports of what the ALJ,
24 the federal ALJ -- inaccurate press reports, keeping to a
25 year-long theme, of what the ALJ said in our hearings back at
26 FERC.

27 The period of time that FERC is now looking at is
28 from October forward. During this period of time, none of these

5

1 market mechanisms were in place. The FERC had already blown up
2 the Power Exchange. There was no second price option. You had
3 a dark, bilateral market, exactly what Enron always wanted.
4 They got exactly what they wanted, and prices went up, not down.

5 Now, I have no quarrel. There's a legitimate
6 economic argument, and there's good arguments on all sides of
7 this, how to sort this stuff out.

8 What's really, and I think this is a real pivotal
9 moment, in all sincerity, in this public dialogue, because
10 there's been a tremendous amount of disinformation, most of it
11 peddled by those attempting to defend the notion of competition
12 on a national and international scale, and fearful that a
13 California thing would spin out of -- would hurt the national
14 movement toward competition.

15 At some point, you all are going to have to
16 dispose of the fiction that California was unique. There's
17 nothing unique about it, and it was a FERC-approved model, you
18 were all there at its birth.

19 And the effort, the fiction of calling California
20 a unique creature didn't work.

21 Now, I'm actually one that believes over the long
22 haul, competition's a good thing if you do it rationally,
23 sensibly, and transition.

24 Enron used to argue that you've got to jump into
25 the swimming pool; just got to go do it. Well, we've seen what
26 happens if you jump into the swimming pool. Some people can
27 survive it; some are little old ladies who have heart attacks
28 and die.

5

1 At some point, you all are going to have take
2 responsibility as a company for both the good and the bad, and
3 the ups and the downs.

4 And you want to get reconciliation in California;
5 you want to get a more rational environment; you want to have
6 all these things.

7 You claim here that you'd be a net beneficiary of
8 refunds. You claim you were more a buyer than seller,
9 allegedly.

10 So, why don't you join us in helping us get our

8ENERGY.TXT

11 \$8.9 billion back? That would be a simple resolution of all
12 this.

13 I'd love the press conference: Ken Lay, Gray
14 Davis, "We demand \$8.9 billion back." Then we can start over.

15 CHAIRMAN DUNN: Let's do this. I've got Senator
16 Johannessen, Senator Bowen, I'm hearing Senator Morrow over
17 here.

18 But Irma, let's establish our quorum since we
19 have a sufficient number now, please.

20 SECRETARY MORALES: Chairman Dunn?

21 CHAIRMAN DUNN: Here.

22 SECRETARY MORALES: Chairman Dunn here. Senator
23 Bowen?

24 SENATOR BOWEN: Here.

25 SECRETARY MORALES: Senator Bowen here. Senator
26 Chesbro?

27 SENATOR CHESBRO: Here.

28 SECRETARY MORALES: Senator Chesbro here.

5

1 Senator Escutia? Senator Johannessen?

2 SENATOR JOHANNESSEN: Here.

3 SECRETARY MORALES: Senator Johannessen here.

4 Senator Kuehl? Senator Morrow?

5 SENATOR MORROW: Here.

6 SECRETARY MORALES: Senator Morrow here. Senator
7 Sher?

8 CHAIRMAN DUNN: Okay, let's go.

9 My apologies, Senator Johannessen, that your
10 opportunity's been interrupted several times. Senator
11 Johannessen.

12 SENATOR JOHANNESSEN: Thank you, Mr. Chairman.

13 Not being an attorney, I'm fascinated by the

14 twists and turns of what is being asserted and what's not
15 asserted, jurisdictional issues, court issues, federal, state
16 issues, and so forth.

17 I was here in '93-94. It started to heat up in
18 '95. I was here in '96.

19 I remember well who lobbied me then for the vote,
20 which I gave them. The same people who met in Phoenix, Arizona,
21 and 30 days later, before the body was cold, asked themselves
22 the question: How can we set ourselves up to take advantage of
23 the power situation in the State of the California?

24 I'm sorry I'm being a layman. I don't know what
25 that means, obviously, or don't mean. I have my own ideas.

26 Quite frankly, I may even have met this Spike
27 fellow because I was a prison guard at one time.

28 [Laughter.]

6

1 SENATOR JOHANNESSEN: I don't know.

2 And whether the confidentiality of the Governor,
3 if the double standard that is being used now, that we can't
4 have anything, we're not allowed as Legislators to see what the
5 Governor is spending, which I think is beyond our comprehension
6 at the moment, and at the same time saying that you have to now
7 deliver all the documentation that you feel is confidential is a
8 double standard. I understand that argument.

9 But mine is a rather simplistic thing. This
10 Committee asked for certain documentation. That documentation
11 was not forthcoming.

12 This Committee gave your company until the 10th,
13 which was yesterday, to produce the documentation. You're not
14 doing it, the excuse being, legal or otherwise -- forgive me
15 because I'm not an attorney -- the confidentiality agreement
16 hasn't been signed.

17 The problem is, from the sound of what I'm
18 hearing, it's going to be a cold day in Hell until this
19 confidentiality agreement will be signed. And if that's the
20 case, then you can object from here until the cows come up to my
21 ranch before anything happens.

22 MR. KIRBY: Senator Johannessen, that is not the
23 position.

24 CHAIRMAN DUNN: Hold on, Mr. Kirby.

25 SENATOR JOHANNESSEN: So, all I'm asking for is
26 basically two things -- clarity I'm asking for. The
27 jurisdictional issue, which was the original question, whether
28 or not we have, as a state, have right to ask for this

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1 information. And whether or not the subpoena powers that we
2 have are sufficient to get the information that we have asked
3 for.

4 Now, if those questions can be answered in the
5 affirmative, that we do in fact have that power, we do in fact
6 can ask the documentation to be produced, and you have not
7 produced it until the timeline, then your are in contempt.

8 Is that too simple, or am I missing something?
9 Otherwise, you're going to spend the next five years in court.

10 CHAIRMAN DUNN: One second, Mr. Kirby. I'm going
11 to let you respond.

12 I just want everybody to understand what we're
13 going to do here quickly, because we need to give the court
14 reporter a quick break coming up.

15 Mr. Kirby, you can respond to Senator
16 Johannessen.

17 Evelyn, if you're okay, we're going to do Senator
18 Bowen and Senator Morrow, and then do the break. Are you okay
19 with that? We'll make them talk fast. Senator Morrow has

20 already assured us he will be quick.

21 So, Mr. Kirby, make it quick, and we'll go on to
22 Senator Bowen.

23 MR. KIRBY: Senator --

24 SENATOR JOHANNESSEN: By the way, I want you to
25 understand. I have no preconceived ideas on this. I want to
26 learn.

27 MR. KIRBY: And I understand. And I think you're
28 on the right track, Senator, and you've hit the highlight of our
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1 objections.

2 You said, if you have the subpoena power, and if
3 you have the jurisdiction, and then if those are issues are
4 determined that you do, and then we refuse, why isn't that
5 contempt?

6 Senator, the opposite has happened here. I have
7 made the objections. No one has ever submitted a single legal
8 argument, brief, or even a telephone argument as to why my
9 objections are invalid. And I've already been held -- my client
10 has been held in contempt.

11 What we are saying is, due process requires what
12 I think you're saying: Listen to the legal arguments; somebody
13 make a ruling on them; and if somebody says, "Enron, you're
14 wrong and the Senate is right," or "The Senate is wrong and
15 Enron is right," that's the way courts operate every day in this
16 democracy.

17 CHAIRMAN DUNN: Hold on, Senator Johannessen.
18 Let Mr. Kirby finish.

19 MR. KIRBY: And there are two reported cases in
20 the history of California jurisprudence of Senate contempt, both
21 of which have been reversed. And what the Senate did in both
22 cases, the courts have said, it is true you are a legislative

23 body, but once you start to try hold somebody in contempt, you
24 have to act like a court. You cannot trample on their right to
25 due process; you cannot disregard their absolute right.

26 Senator, with all due respect, an accused
27 criminal has been given more opportunity to have a hearing on
28 their objections than I have. Nobody has ever told me today
6

1 that my objections are without merit. I think Senator's going
2 to rule on them, which I have a problem with, but at least in a
3 democracy, you get a court hearing.

4 I was told Thursday by letter at noon, on the
5 5th, if you've got any legal authorities, I want them on file by
6 Friday. I stayed up all night. You've got a 12-page argument.
7 I think there's 9 or 10 cases. Our legal arguments are sound
8 and I stand.

9 I have yet to see a single case, a single
10 statute, ever cited to me that says, your legal arguments on the
11 subpoena issues are full of hot air.

12 If Larry Drivon said, "Mr. Kirby, go read the
13 Jones versus Smith case, it says we have the exact power to do
14 what we're doing," I would go read it, and if he was right, I
15 would tell my client, "I think there's some legal argument."

16 That hasn't happened, Senator. And you're
17 right. If you have the jurisdiction, and if you have the
18 authority, but those issues have never been resolved, and I'm
19 already in contempt. And that's the problem that my client has,
20 and why we think we're not getting a fair shake.

21 CHAIRMAN DUNN: I want to reiterate, as I started
22 this hearing, the Chair prepared to make recommendations and
23 address the concern that you've just raised, Mr. Kirby.

24 I know Evelyn's getting really dicey over here.
25 Senator Bowen, can you hold for a moment? Senator Morrow, can

26 you hold for a few moments? We'll give Evelyn a break.
27 We're going to take 15 minutes. We're going to
28 come back. Senator Bowen, Senator Morrow, and I believe

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1 Mr. Drivon also wanted to add something as well. Fifteen
2 minutes, everybody.

3 [Thereupon a brief recess
4 was taken.]

5 CHAIRMAN DUNN: On the record.

6 I want to alert everybody. We've got a bit of a
7 time crunch. We have to be out of this committee room at about
8 1:20, 1:25, because there is a 1:30 committee hearing in this
9 room that we have to vacate for.

10 My preference is that we be concluded by that
11 point in time, which means we have to cover a lot of ground in a
12 short period of time.

13 I know that Senator Bowen wanted to make some
14 comments. I know that Senator Morrow wanted to make some
15 comments. We'll turn to those. Ask Mr. Kirby if he has any
16 additional comments.

17 And Mr. Kirby, I will make my recommendations, as
18 I've been saying all along here, on the objections, certainly
19 open it back up to you for more comments with respect to those
20 objections, and then try to wrap things up here, hopefully,
21 fingers crossed, by 1:20 this afternoon.

22 MR. KIRBY: So, am I to address the objections
23 right now, ahead of --

24 CHAIRMAN DUNN: If you want to address the
25 objections ahead of time, you're welcome to do that, but you did
26 submit the objections and you did submit your legal analysis.
27 I'll give you that opportunity.

28 We don't have Senator Bowen here. Senator

1 Morrow, did you want to make comments prior to the break?

2 SENATOR MORROW: It seems like we're getting back
3 on track.

4 Mr. Kirby, it strikes me that your client has
5 served you up and has invited itself somewhat to a public
6 flogging here today.

7 MR. KIRBY: That's why I get paid the big bucks,
8 Senator.

9 SENATOR MORROW: And I think in some measure,
10 perhaps, deservedly so, and Senator Peace has fit the bill.

11 But I think this Committee has been very generous
12 in its time. An attorney of your caliber, and certainly with
13 Enron, with its resources, frankly, what we're hearing today we
14 should have heard back on June 28th.

15 Be that as it may, we are here. We're hearing
16 your objections. So far I've heard three. I understand there
17 are more in the written document.

18 While I have done some research myself, in an
19 open argument, if our Special Counsel or the Chair cares to
20 address those objections or wish to add to that, let's get on
21 with that. I've got a very busy day.

22 CHAIRMAN DUNN: Great point, Senator Morrow.

23 Senator Bowen, did you want to comment, then
24 we're going to get right to the objections, because we have to
25 wrap up by 1:20.

26 SENATOR BOWEN: I want to be clear that this
27 process that we're undergoing, this legislative subpoena, is
28 very different than what you might get in a court.

1 The reason for that is the aims of the
2 Legislature are different. I think it's important for people to

3 understand that.

4 We do not have the power to render a money
5 judgment. We cannot impose a jail sentence; although, we do
6 have the power to issue contempt citations.

7 But the purposes for which we seek information
8 are because we are responsible for setting policy for the State
9 of California.

10 This morning, the Federal Energy Regulatory
11 Commission issued an order forcing four regional transmission
12 organizations to be filed in this country. That raises the
13 stakes in our discussion about what we should do as we decide
14 how to structure our energy system. And it, I think, makes it
15 all the more important that we really understand how this market
16 functions and what is happening. This may be the moment, the
17 dividing moment in our decision to take control over the
18 transmission lines, to own the transmission lines.

19 But all of these are policy matters that we
20 cannot make good judgments about without access to information.
21 And our power to get that information is broad, because our
22 responsibility to set policy that fuels -- that will allow
23 electricity to flow to both the new economy servers and the old
24 economy cement plants is broad.

25 The contempt, a contempt citation takes an actual
26 vote of the entire Senate. It is not until that occurs, and it
27 has not yet occurred, that there is a formal contempt finding
28 concluded. We're not there yet. We are in the process of going

6

1 through that.

2 CHAIRMAN DUNN: Mr. Kirby, let's turn to you.

3 Mr. Drivon, did you have some short comments to
4 make? Notice my editorial there.

5 MR. DRIVON: I do.

6 You're prepared to take up question of objections
7 at this time.

8 CHAIRMAN DUNN: Yes, sir.

9 MR. DRIVON: As that process begins, I wanted to
10 say that this is not an adversarial process. Counsel complains
11 that he has not been provided with points and authorities with
12 respect to his objections, et cetera, confusing this with an
13 adversarial process, which it is not.

14 Further, Senator Dunn, the question of who should
15 rule on these objections is clearly set out by California
16 statute. And the person to rule on such objections as may be
17 proper and relevant would be you, sitting as the Chair, or the
18 Committee, if that is your choice.

19 Further, there is considerable question insofar
20 as I am concerned, and I believe my point has some concurrence
21 by some of the Legislative Counsel who looked at this, there is
22 considerable question as to whether, if, and to what extent
23 objections are appropriate in this setting.

24 And as you move toward the point where you
25 determine whether to address these objections, I just remind you
26 of those points in my capacity as Special Counsel.

27 And I just hope I'm worth what I'm getting paid.

28 CHAIRMAN DUNN: Here's what we're going to do.
6

1 Mr. Kirby, I'm going to give you your time. I know there's some
2 points you want to cover. Try to make it as brief as possible.
3 We've covered a lot of ground.

4 And as you hear in court all the time, Mr. Kirby,
5 don't repeat what's in your papers. This Senator, your Honor,
6 whatever I may be, have read them thoroughly. But if there's
7 additional comments you want to make, Mr. Kirby, please.

8 MR. KIRBY: Thank you very much, Mr. Chairman.

9 Your Honor, I'll try to go right to it.

10 We have made objections -- let's back up.

11 The subpoena, and Senator Bowen raised the issue,
12 but a subpoena is a subpoena. And I respectfully submit the law
13 regarding subpoenas does not vary in terms of what is required
14 for a subpoena duces tecum between a state court and a state
15 legislature. Both of them require an affidavit.

16 I think the Senate recognized that, because every
17 subpoena that this Committee has served has been accompanied by
18 an affidavit. That's CCP 1985.

19 Once you go that route, the affidavit must comply
20 with California law. The case's replete. You cannot file an
21 affidavit saying that the witness is informed and believes.
22 That's the essence of this.

23 There are a number of other defects in that
24 affidavit. It can't be conclusionary, and that is addressed in
25 the cases that we have cited. So, there's a defect.

26 It raises -- and I'm going to go right now to
27 what Mr. Drivon said -- is that you as the providing -- as the
28 presiding officer, decide this.

6

1 The statute that I think he's referring to is --
2 is it the Evidence Code you're relying on Counsel?

3 MR. DRIVON: I believe it's the Government Code.

4 MR. KIRBY: The statutes in the state talk about
5 when, if the presiding officer, if it's not a court, should
6 resolve the claims in the same manner as a court determines,
7 for obvious fairness reasons.

8 Senator, I have raised objections to the
9 substance and adequacy of your affidavit. You are now going to
10 rule on those. If I came to this hearing and suggested,
11 Senator, why don't you let me rule on your affidavit, you would

12 all hurt yourselves laughing because I'm not impartial.

13 But the procedure that is set up is that you are
14 going to rule on my objections, and I dare say, after I've
15 already -- my client's already been voted in contempt.

16 And our position is, and I think Senator
17 Johannessen was on the right track, the first thing would be to
18 have a hearing and let somebody decide these issues. And then
19 somebody may well tell us that I'm wrong, all right? It's
20 happened before. But we are entitled as a matter of due process
21 to that sort of a hearing.

22 Your Honor, that's -- let me draw for the benefit
23 of this panel the situation that Enron finds itself in. It
24 received a subpoena for 112 categories. It was told, file your
25 response by 1:30 on the 28th. It did serve the response. It
26 did that. We served our response by the 28th.

27 We raised objections. No one has ever to this
28 time, 12:30 on the 11th of July, ever said to me, "I've read
7

1 your objections, and we consider them to be valid or invalid,
2 and here's the contrary argument."

3 In fact, in all fairness, I just had a discussion
4 with Legislative Counsel in the Men's Room about the subpoena
5 issue. And I think both sides have rational arguments.

6 It is a case that's never been decided.

7 So, our point is, here I am, voted in contempt.
8 Now I get a hearing on my objections. I'm told with one day's
9 notice to file my legal arguments. I did that. I filed it.

10 I've still never seen anything in opposition to
11 it.

12 I think it is, therefore, I respectfully submit,
13 Senator, it's a foregone conclusion that the objections are
14 going to be overruled. And I don't think that is what is

15 contemplated as a due process fair hearing.

16 By the same token, I have indicated a willingness
17 to meet with counsel with the Committee to try to resolve this
18 issue.

19 It was not our preference to file a lawsuit
20 yesterday. We even, given the message we got, wasn't much
21 choice.

22 But those issues, I think, can be resolved.

23 There is a single issue that is -- there's two
24 single issues here: the jurisdictional issue, the objections
25 beyond the State of California; the confidentiality issues.
26 And I think the confidentiality issues probably, and talking to
27 both Alexandra and to Mr. Drivon, are closer to being resolved.
28 But those are the fundamental issues.

7

1 And I haven't seen the deal that was made with
2 Mirant. I haven't had a chance to discuss it with my client.

3 So my position is, your Honor, we've been told
4 we're going to be treated the same as everybody else. If we are
5 on the same calendar as everybody else on July 18th, we will
6 be. And I say this not as -- let me just paraphrase.

7 I respectfully submit I do not believe in the
8 present context that this is going to be the only lawsuit that
9 is on file over the issue of confidentiality.

10 CHAIRMAN DUNN: We've been told that before, not
11 by you.

12 MR. KIRBY: Not by me.

13 And it was forced upon us, in my view, because of
14 the nature of the contempt proceeding.

15 But I think those issues of confidentiality can
16 and should be resolved without raising what Senator Peace refers
17 to as a major conflict between the Legislature and the Judicial

18 Branch.

19 But we don't -- if we have a disagreement,
20 Senator, with the Legislative Branch, and the threatened
21 consequence is, we're going to hold you in contempt, the only
22 alternative we have is the Judicial Branch.

23 CHAIRMAN DUNN: I suspect counsel over here is
24 looking to add something?

25 MR. FERGUS: No comment.

26 CHAIRMAN DUNN: Good, I was wrong.

27 Mr. Drivon, your response, then we're going to
28 move forward.

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1 MR. DRIVON: Senator, on the issue of the
2 affidavit, Mr. Kirby avers that we all agree that in this
3 setting, an affidavit is required. As a matter of fact, the
4 Senate must agree, because after all, we attached affidavits.

5 I do not concur that an affidavit is required to
6 be a part of such a subpoena.

7 And as far as the application of CCP Section 1985
8 is concerned, to which he has referenced, an affidavit under
9 that statute is to be attached to a subpoena duces tecum in a
10 pretrial setting. This is not a pretrial setting.

11 He cites as his lead authority the Superior Court
12 of Santa Barbara Versus Las Padres Aviation. That particular
13 case deals with a situation in which there was a pretrial
14 subpoena duces tecum. And they found that that particular
15 affidavit was incomplete.

16 CHAIRMAN DUNN: Okay.

17 If there's any further comments by the Committee,
18 or if there are none, I'll go forward and made a recommendation.

19 Mr. Kirby, last comment.

20 MR. KIRBY: Mr. Chair, a couple of points, your

21 Honor, because I want to clear up a point, and I think -- I want
22 to make sure it's true.

23 While we have raised the FERC objection, Senator
24 Peace and I have discussed it, we have never said we are
25 refusing to produce any documents based on the FERC objection.
26 Otherwise, why would we be producing 30,000 documents to a
27 document repository?

28 We have raised the objection. We think it has to
7

1 be resolved in another forum.

2 We have never said, and I want that clear, that
3 we have never said we're not going to give this Committee one
4 single document because we think it belongs in FERC.

5 Nor, and I want to make this clear, I think it is
6 clear in the lawsuit that was filed yesterday, we did not ask
7 the Superior Court to stop anything this Committee is doing on
8 the grounds of FERC. There are very limited issues that are
9 raised in that lawsuit.

10 Finally, the suggestion was made, well, what is
11 Enron hiding? Senator, Enron turns over every single record
12 and document that the FERC demand that it turns over.

13 But as this Chair knows, and I think the whole
14 panel knows, there are FERC tariffs on confidentiality. There
15 are consequences. There are assurances that there, in fact, is
16 going to be confidentiality.

17 Finally just one point. Your Honor, this is a
18 subpoena duces tecum. It must be supported by an affidavit.
19 And if you look at the codes, West Codes or the Dearings Codes,
20 they will give you cross reference to CCP 1985, which talks
21 about the affidavit.

22 And like I'm saying, the unfairness of it is, I
23 am hearing Mr. Drivon's arguments for the first time today,

24 after my client's been held in contempt. I've never had an
25 opportunity to even listen to what his legal arguments are. The
26 case he cited I honestly don't think is in our brief. Maybe it
27 was in a memo that he -- it's not a case that I cited, and so, I
28 can't respond to a case I've never seen.

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1 But that's the inherent unfairness of the
2 position of finding someone in contempt, and then ruling on
3 their objections.

4 And I submit, Senator, I have no questions about
5 your integrity, but it does not pass the appearance of
6 impartiality to have the Chair say, "I'm now going to decide the
7 adequacy of my own affidavit." And that's what we're doing.

8 CHAIRMAN DUNN: Senator Peace.

9 SENATOR PEACE: Counsel has repeatedly referenced
10 an alleged finding of contempt.

11 Has there been any actual finding of contempt?

12 CHAIRMAN DUNN: Let me clarify that.

13 There are several steps to the contempt process.
14 The first one is what we did a week-and-a-half ago.

15 For this process to be complete, we now have to,
16 as Senator Bowen indicated before, make a report to the full
17 Senate. The full Senate then may act upon that report and
18 decide upon whether any action is necessary upon the report
19 that's made.

20 We are at the report stage at this point in time.

21 SENATOR PEACE: So, there's been no actual
22 finding of contempt.

23 CHAIRMAN DUNN: Ultimately, the full Senate will
24 decide what's to be done in that regard.

25 SENATOR PEACE: Are we in the middle of the due
26 process part?

27 CHAIRMAN DUNN: And if you bear with me, I think
28 you'll see at least where the Chair sits on the issues raised by
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1 Mr. Kirby.

2 SENATOR PEACE: I'm kind of a neophyte here.

3 So, it sounds to me like counsel is, the court
4 equivalent would be to run into the first day of trial and say,
5 "Judge, you aren't giving me my due process rights," before the
6 argument is even put before the judge.

7 CHAIRMAN DUNN: I suspect Mr. Kirby would change
8 that analogy a little bit.

9 MR. KIRBY: A lot, your Honor.

10 CHAIRMAN DUNN: I know that. Let's not go there
11 at this point.

12 Senator Morrow.

13 SENATOR MORROW: I would also comment that at
14 least the Senators that I'm surrounded with aren't exactly
15 pushovers or potted plants up here. And if we disagree with any
16 of your recommendations, Senator Dunn, I think you're going to
17 hear about it.

18 CHAIRMAN DUNN: I have no doubt. There's no
19 Member of this Committee that could be considered a potted
20 plant.

21 Mr. Kirby, let me do it this way. What I'm going
22 to operate off of here is in fact the objections to the subpoena
23 that Enron filed on the day of the hearing. I did review your
24 legal authorities that you also submitted to us as well. But
25 I'm going to operate off of that particular document, if you
26 have it before you.

27 I want to walk through very quickly each of the
28 objections that you've raised, both the ones that have been done
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1 on a preliminary basis, as well as the numbered objections, One
2 through Seventeen.

3 What I'd like to do, I want to make some
4 preliminary comments, and then walk through the seventeen so you
5 know exactly where the Chair is, and what the Chair's
6 recommendations are to the Committee with respect to those.

7 MR. KIRBY: Can I ask, I'd like a point of
8 clarification here.

9 Is it the Committee's position that Enron has not
10 been voted in contempt by the Committee? Because that certainly
11 is what the motion that was forwarded to me says.

12 CHAIRMAN DUNN: The motion, the Committee finds
13 them in contempt, that was the motion last week. But the
14 contempt, the whole matter or the whole issue is a process.

15 Nothing can be done with a finding just by this
16 Committee. The full Senate has to act before the entire process
17 is complete.

18 Bear with me, Mr. Kirby, because there may be a
19 middle ground that, while I know your client doesn't like the
20 position it has found itself in, that if your representations
21 I'm hearing correctly, may provide a solution to the concerns
22 that you have raised, Mr. Kirby. So, bear with me, if you will.

23 MR. KIRBY: I will.

24 CHAIRMAN DUNN: First, I'm going to do this first
25 comment a little light-heartedly, Mr. Kirby, because each of the
26 generators -- not each, but a couple of the generators have
27 engaged in trying to rename the Committee on their own.

28 And the pleading that you guys had submitted, ⁷

1 that Enron had submitted, renamed us into the, "In the Matter of
2 the Senate Select Committee Investigation of the Wholesale
3 Energy Market."

4 That's not the complete name, and I'd ask that
5 when you guys prepare these documents and are going to submit
6 them, use the complete name. I notice you did in the lawsuit
7 but did not here.

8 It's Investigation of Price Manipulation of the
9 Wholesale Energy Market, and I think one generator had submitted
10 something that said, "Alleged Price Manipulation."

11 MR. KIRBY: The Committee's name does suggest a
12 predetermined disposition, Senator.

13 CHAIRMAN DUNN: Only if you read it that way,
14 Mr. Kirby. Only if you read it that way.

15 Let me make some general comments first that are
16 going to echo some of the sentiments you've heard expressed by
17 some of the Committee Members as well as Mr. Drivon, which I
18 also agree to, and with no particular order here.

19 First, let's understand what the purpose of this
20 investigation is. The purpose of the investigation is not to
21 determine the guilt or innocence of anybody, or any company, or
22 corporation. It's not to determine the liability or
23 nonliability for anything of any person, or company, or
24 corporation.

25 We are investigating the behavior in the
26 wholesale electricity market to determine whether there is any
27 legislative action that is warranted by this body, the
28 California State Legislature. That's what this investigation is

1 all about.

2 Again, let me reiterate. We're not looking for
3 the guilt or innocence of anybody. We're looking and examining
4 market behavior to determine whether legislative action is
5 necessary.

6 That's an important thing to bear in mind,

7 because there is a fundamental difference between the court
8 proceedings that Mr. Kirby has drawn the analogy to this morning
9 and what we are doing here. And the due process arguments that
10 Mr. Kirby has advanced, while certainly are dead-on accurate
11 with respect to court proceedings where guilt or innocence, or
12 liability or nonliability, are at issue, that's not what's going
13 on with respect to this investigation.

14 So, the same due process concerns that are
15 applicable to a court proceeding are not equally as applicable
16 to an investigation by the Legislature to determine if
17 legislative action is necessary.

18 Thus, we have to underscore, there's a
19 fundamental difference between what we do as a legislative body
20 investigating a particular issue and what the court system
21 does.

22 I also want to reiterate, this is a process, as I
23 just indicated in response to Senator Peace's question and
24 comments earlier, a process that is not finalized until there is
25 a determination by the full Senate on whether to act upon the
26 recommendations made by this particular Committee.

27 So, that process can be terminated anywhere along
28 the line should compliance be found by the Committee. That's a
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1 critical one, because it may address some of the concerns,
2 whether I agree or disagree with them, Mr. Kirby, may address
3 some of those concerns.

4 I also want to reiterate, there is a fundamental
5 question as to whether, in an investigative proceeding, there is
6 a right to assert the type of objections that you find in a
7 court proceeding, civil or criminal. We recognize the right,
8 for example, in the most obvious case of self incrimination.
9 But for many of the objections which are primarily evidentiary,

10 there is a question as to whether in fact they are really --
11 there is even any authority to assert them at this particular
12 stage. But we will address the objections nonetheless.

13 Also, the subpoena, the issue on June 28th was
14 not a response to the subpoena. The issue was compliance with.
15 Now, we're going to get into some nuances, I'm sure, and debate
16 that to the Nth hour.

17 But bear that in mind, that with the subpoena,
18 it's not like a response to a discovery request in a litigation
19 arena, where a response that is all objections is deemed a
20 response.

21 Here we're dealing with compliance.

22 And finally, in my general comments, and I'll get
23 right to the objections themselves, Mr. Kirby, from the Chair's
24 perspective, I understand the argument that you're trying to
25 make that we are really -- we are being treated differently than
26 the other market participants. And I agree with the sentiments
27 you've heard from many of the Committee Members, that I don't
28 agree with that argument.

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1 The response and dealings that we've had with
2 Enron, at least up until now, and you've made some comments
3 today that may reflect what I perceive to be a change in the
4 approach Enron is taking, but up to now, the approach to Enron
5 has been fundamentally different than the other market
6 participants.

7 The other market participants, as you correctly
8 point out, or most of them, asserted objections. That's true.

9 But along with their objections, they engaged in
10 active discussions with us about confidentiality, setting up the
11 document depository, providing documents, et cetera. There's
12 been a fundamental difference, at least from the perception of

13 the Chair, as to how Enron has responded to the legislative
14 subpoena versus the rest of the market participants.

15 Let me go to the objections themselves,
16 Mr. Kirby, and I'll run through them relatively quickly so that
17 we get to the point. We're not here for long legal
18 dissertations.

19 I'm going to start on Page One because there are
20 some preliminary objections, and then you have specific numbered
21 objections.

22 And for the audience's purposes, no, we are not
23 going document request by document request, and cover all 104.

24 The way that Mr. Kirby's office handled the
25 objections -- which I think was a very logical way, by the way,
26 Mr. Kirby, made it for ease of handling; I thank you for that --
27 is, they asserted approximately 17 objections, and then for each
28 question, they said, "Objection 1, 3, 5," et cetera.

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1 We're just going to quickly go through the
2 preliminary and then the 17 objections. I'll make my comments,
3 open it up to you, Mr. Kirby, open it up to the Committee.

4 MR. KIRBY: Could I just respond to one of the
5 points so we sort of stay on track, your Honor.

6 CHAIRMAN DUNN: You may.

7 MR. KIRBY: I want to address the issue about --
8 that Enron was not a part of the discussion in the protective
9 order. From a historical perspective, the first document
10 requests were sent to five generators. It was not sent to
11 Enron. We were requested about three weeks later, and I wasn't
12 even involved in the process.

13 Then the discussions were -- and I know, Senator,
14 because I was at one of the hearings -- you made the statement:
15 The way the Committee intends to deal with this, they're going

16 to deal with the generators and then Enron. And I know
17 representatives have talked to you about that.

18 So, but I participated as soon as I got involved.
19 I participated in the discussions, had great input, I like to
20 think, on the protective order. We participated along the way,
21 and it was always -- we were, in fact, at one point, Mr. Drivon
22 and I had the discussion that, you know, Enron is behind
23 learning curve because we came into the process later.

24 But we have participated. So, I don't want there
25 to be a misconception that, A, we didn't participate, and B,
26 this Committee has always taken the position, at least with me
27 and with anybody else, it's going to deal with the generators,
28 then Enron is next. We understood that.

8

1 So, in fairness, to say that, you know, we
2 haven't participated, we -- I got all the draft protective
3 orders. I had my input.

4 As the Committee knows, and Mr. Drivon will
5 confirm, Mr. Kleinman acted as the spokesman because it didn't
6 make sense to have six different lawyers.

7 CHAIRMAN DUNN: We understand that. We covered
8 this extensively at the last hearing.

9 MR. KIRBY: I want to make clear that I was
10 having full input with Mr. Kleinman. So, I don't want to create
11 the impression that, well, we sat on the sidelines and refused
12 to participate. We were actively involved. But Mr. Kleinman
13 had been designated, because the generators were going first, to
14 be the spokesman on the issues of confidentiality.

15 CHAIRMAN DUNN: Okay, let's go forward.

16 The first preliminary objection, and for the
17 audience sitting here, so you're not completely in the dark,
18 I'll briefly describe what the objection is that we're talking

19 about.

20 On Page One, Mr. Kirby,
21 "Preliminarily, Enron objects
22 that the investigation by the
23 Committee violates the exclusive
24 jurisdiction of the Federal
25 Energy Regulatory Commission to
26 investigate, regulate, and
27 administer the wholesale
28 electricity market in California

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1 and elsewhere."

2 I understand your comments here, that you are not, if I
3 hear you correctly, Mr. Kirby, you are not using that objection
4 as a means of refusal to produce documents.

5 But so it's clear, I will give you at least the
6 Chair's quick comments on that particular objection.

7 The Chair at least disagrees -- yes, Mr. Drivon.

8 MR. DRIVON: Mr. Chairman, I think it's important
9 at this point to have Mr. Kirby tell us whether or not Enron
10 still makes that objection.

11 CHAIRMAN DUNN: Fair question.

12 MR. DRIVON: In other words, does Enron still say
13 that they object, "that the investigation by the Committee
14 violates the exclusive jurisdiction of the Federal Energy
15 Regulatory Commission to investigate," comma, dot, dot, dot.

16 CHAIRMAN DUNN: Mr. Kirby.

17 MR. KIRBY: Your Honor, it has been Enron's
18 position from Day One that the exclusive jurisdiction to
19 investigate, regulate, and administer the wholesale electricity
20 market is FERC.

21 But you are absolutely correct, Senator, that

22 having said that, and having preserved that objection, we are
23 not refusing to produce documents based solely on that
24 objection. I think that's clear. I hope that's been clear.

25 CHAIRMAN DUNN: Senator Bowen.

26 SENATOR BOWEN: In the event that the state
27 exercised the power of eminent domain and took the transmission
28 lines and all the generating assets, would you disagree that we

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1 would no longer, as state owners, be subject to the jurisdiction
2 of the Federal Energy Regulatory Commission?

3 MR. KIRBY: Senator, could you -- I would ask two
4 things. Could you give me that again? I think that that's the
5 question that I certainly didn't come here prepared to argue or
6 even consider.

7 But I'm not sure I understand your question, and
8 it's my fault, not yours.

9 SENATOR BOWEN: The question, well again, we are
10 here not just to understand what happened, but to make
11 determinations about what the electricity generation and
12 transmission system should look like in this state.

13 And there is, I think, little question that
14 municipal and state owned utilities are not subject to the
15 jurisdiction of FERC on the wholesale market. FERC itself has
16 said, "We do not very power over the Bonneville Power Authority.
17 We do not have power over the Los Angeles Department of Water
18 and Power, over BC Hydro," over a variety of public utilities.

19 CHAIRMAN DUNN: Senator Bowen, can I interrupt
20 with my apologies? Because of our time, would you mind if we go
21 through the objections first, and then return to anything?

22 SENATOR BOWEN: No.

23 CHAIRMAN DUNN: Thank you.

24 SENATOR BOWEN: The point just is that it may be

25 that right now FERC has jurisdiction over the wholesale market,
26 but exactly the same constituents of the power generating and
27 transmission system could, if owned by the state rather than by
28 private utilities, be non-FERC jurisdictional. Then we would
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1 have jurisdiction to look at all of these things.

2 We can't make that determination without
3 information. Again, the legislative subpoena has a different
4 purpose than a trial subpoena.

5 MR. DRIVON: And Senator, their objection is, as
6 I read it there, and he is saying, yes, they make the objection,
7 they object on the grounds that this Committee does not have the
8 power to make this investigation.

9 CHAIRMAN DUNN: Yes, I understand that,
10 Mr. Drivon.

11 What I will do quickly from the Chair's
12 perspective is, that as to that objection, whether we have a
13 debate about it being asserted or not -- I'm not sure it is or
14 isn't here -- but Mr. Kirby, so that you know what the position
15 of the Committee, at least the Chair is as recommended to the
16 Committee, is that that objection is overruled.

17 The Senate investigation does have the power to
18 investigate. It is very broad, and it includes the ability to
19 look into the wholesale electricity market to determine if there
20 is legislative corrective action that is necessary and within
21 our jurisdiction to do so.

22 Next, I'm on Page Two, Mr. Kirby.

23 MR. KIRBY: Your Honor, to move it faster, I
24 would agree -- is that the Chair's ruling on objection Number 1?

25 CHAIRMAN DUNN: You're right. I was going to say
26 when I got to Objection 1, that relates to your Preliminary One
27 in the same stance.

28 So, and the same goes for the next one because
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1 your next one in your preliminary comments is:

2 "Enron further objects that the
3 Committee's subpoena seeks to
4 exercise jurisdiction over
5 voluminous documents located
6 outside the State of California,
7 and thus beyond the jurisdiction
8 of the subpoena issued in
9 California by the Committee."

10 That relates to your numbered Objection Number 3,
11 if I'm correct.

12 MR. KIRBY: I agree, your Honor. That's exactly
13 what it relates to.

14 CHAIRMAN DUNN: All right.

15 The Chair's recommendation on that particular
16 objection is to overrule the objection. Again, the legislative
17 subpoena is a different legal animal than a subpoena that is
18 provided by the CCP for litigation purposes, and that, in fact,
19 we believe, based upon legal authority available, that we have
20 the power to reach to documents that exist outside of California
21 but that are within the control of a person, corporation, et
22 cetera, that has a legal presence in the State of California.

23 MR. KIRBY: Just briefly, could I get any legal
24 authority for the Committee's position?

25 CHAIRMAN DUNN: The answer is, I'm giving you
26 what I'm giving you at this point, Mr. Kirby. After we finish
27 here, if we want to discuss further on it, we can.

28 Next, and again, that's numbered Objection Number
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1 3, but I want to make sure we take care of the preliminary ones.

2 This next one was the objection that was raised
3 or addressed by Senator Peace. I'm on Line 10, Page Two:

4 "Enron further objects that the
5 Committee's investigation,
6 including the subpoena, is
7 related to do California
8 Attorney General's
9 investigation, which is fatally
10 and irreparably compromised by
11 the blatant public bias and
12 hostility which the Attorney
13 General, as the State's highest
14 legal officer, has displayed
15 toward Enron and its officers. "

16 That objection, from Chair's recommendation, is
17 overruled. This investigation is not related to the California
18 Attorney General's investigation. They are entirely separate
19 investigations. We have no power to involve ourselves or
20 influence the Attorney General's investigation and vice-versa,
21 and they are for different purposes.

22 Again, this investigation is to determine if any
23 legislative action is necessary.

24 I suspect, although I don't know the thinking of
25 the Attorney General, that that is for purposes of either civil
26 or criminal liability, which is not at issue in this particular
27 investigation.

28 Moving to Line 17, Page Two:

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1 "Enron further ... objects to
2 the instructions and definitions
3 contained in the subpoena on the
4 grounds they are vague,

5 ambiguous, burdensome,
6 argumentative and beyond the
7 scope and extent of both the
8 subpoenaing party's legal and
9 regulatory authority and
10 subpoena power. "

11 I think we've already addressed the scope
12 question there, Mr. Kirby, with respect to on the grounds they
13 are vague, ambiguous, burdensome, and argumentative.

14 I know you have raised questions, not integrity
15 questions, but clearly the question of whether I am in a good
16 position to be ruling on them when I drafted and put input into
17 the draft of them. But I review them again to look at them, to
18 determine, at least from my perspective, as an outsider looking
19 in at this industry, they did not appear to be vague and
20 ambiguous, burdensome, et cetera.

21 But I will -- my recommendation is to overrule
22 the objection, but where your client, Enron, really doesn't
23 understand a question, we're happy to engage in discussions with
24 you to clarify those questions as well.

25 MR. KIRBY: Senator, I wasn't there, but it has
26 been reported that when the Committee considered the subpoenas
27 and the breadth of materials requested -- the Rules Committee,
28 I'm sorry, the Rules Committee -- that comments were made that

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1 no one on the Committee could possibly live long enough to
2 review the documents that had been requested, which I think is a
3 reflection on the over-broad nature as well.

4 SENATOR PEACE: There you go, taking things too
5 seriously.

6 [Laughter.]

7 CHAIRMAN DUNN: Yes, exactly.

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8 Let me make a point on that one, Mr. Kirby,
9 because clearly, from the Rules Committee perspective, they
10 forever have to watch over the resources available to the State
11 Senate. Nobody questions that at all.

12 We knew at the outset of this, and we discussed
13 it in very early meetings with the representatives from the
14 market participants, that the issue of documents would be
15 voluminous. And where we can minimize each other's burdens, we
16 are very willing to do that, still are willing to do that, and
17 will continue to engage in those discussions so we that don't
18 have you produce a bunch of documents that are going to sit idle
19 in a warehouse. And we will continue those discussions with all
20 the market participants.

21 Next, I'm on Line 23 of Page Two:

22 "Enron hereby states it
23 objects to each specific
24 request made in the 112
25 separate categories sought by
26 the subpoena, many of which are
27 directed to generators and have
28 no application to Enron."

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1 I'm going to surprise you here, Mr. Kirby. That
2 objection is partially granted because you are right, some of
3 them do go to generators.

4 MR. KIRBY: Should I say Hallelujah?

5 CHAIRMAN DUNN: Just bear this in mind when you
6 make comments to your client, or to any media representatives,
7 that your assumption they'd all be overruled is incorrect.

8 That also relates to one of the numbered ones, so
9 we are actually clicking off some of the numbered ones as we're
10 going through here as well.

11 So, where the question, of course, is a
12 generator-directed question that was inadvertently included in
13 the request to Enron, such as maintenance logs on gas-fired
14 generation facilities in California, clearly that objection is
15 well-founded.

16 Next, Line 27, Page Two, "Enron's right to be
17 ..." they object because the requests:

18 "... including those that are of
19 a constitutional nature, as they
20 implicate Enron's right to be
21 free from unreasonable searches
22 and seizures and its due process
23 rights"

24 Again, from the Chair's recommendation, I
25 recommend that we overrule that objection. I think the legal
26 authority is solid that, in fact, we do have the right
27 generically to subpoena witnesses and documents, and it does not
28 constitute an unreasonable search and seizure.

9

1 Page Number Three, Line 2:

2 "Enron also objects to the
3 extent that the subpoena seeks
4 any document or information
5 which is or may be privileged,
6 proprietary or confidential in
7 nature."

8 This relates to basically the confidentiality
9 side. We have engaged in negotiations, as everybody is aware,
10 with all of the market participants. Where there are legitimate
11 grounds for confidentiality claims, Mr. Kirby, we have always
12 been and continue to be willing to provide the protection that
13 is available, that we can provide to you for legitimately

14 confidential, privileged, proprietary matter.

15 We've done that with others. We've done that
16 with the ISO, the PX, et cetera, and we will, of course, do that
17 with respect to your concerns in that regard as well.

18 MR. KIRBY: Senator, I didn't look at the Mirant
19 agreement, but does it provide for a court protective order?

20 CHAIRMAN DUNN: It does not provide for it. It's
21 a written agreement between the Committee, subject of course to
22 Leg. Counsel's approval, and the market participants. In that
23 case it was Mirant.

24 I'll state each of these objections. Some of
25 them do not need to be addressed because we've already done it
26 in the preliminary matter.

27 Mr. Kirby, I'm on Page Three, starting with your
28 Objection Number 1:

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1 "The Subpoena is void and/or
2 unenforceable in that it
3 improperly seeks to invade the
4 exclusive jurisdiction of FERC
5 over the wholesale electricity
6 market. "

7 I've already addressed this one. The Chair's
8 recommendation is to overrule the objection.

9 Objection Number 2:

10 "The subpoena is void and/or
11 unenforceable in that it
12 improperly seeks information
13 deemed confidential under any
14 applicable FERC tariff, rule or
15 procedure. "

16 We've already addressed this one. The Chair's

17 recommendation is to overrule it as to nonconfidential, but we
18 are and continue to be willing to enter into reasonable
19 confidentiality agreements to protect those that have legal
20 grounds for protection, such as FERC tariffs, or legitimate
21 trade secrets, et cetera. So, that deals with Objection
22 Number 2.

23 Objection Number 3:

24 "The subpoena is void and/or
25 unenforceable in that it
26 improperly seeks the production
27 in California of documents
28 located outside the state of

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1 California. "

2 We've already addressed this one. The Chair's
3 recommendation is to overrule the objection.

4 Objection Number 4:

5 "The subpoena is void and/or
6 unenforceable in that it
7 improperly seeks production of
8 trade secrets pursuant Texas law,
9 California Civil Code Section
10 3426.1, or any similar statutory
11 or case law. "

12 Again, this one is overruled to the extent that
13 the claim of trade secrets, et cetera, is not founded on solid
14 legal ground, but where there are legitimate trade secrets, et
15 cetera, this Committee will provide confidentiality for those
16 documents, as we have done with some of the other market
17 participants already.

18 Objection Number 5:

19 "The subpoena is void and/or

20 unenforceable in that it
21 improperly seeks documents and
22 information which constitutes or
23 contains sensitive and proprietary
24 financial information, the same
25 claims of confidentiality which
26 the Attorney General of California,
27 on behalf of the Governor of
28 California, has been repeatedly

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1 asserting in San Diego Superior
2 Court Action No. GIC 764413. "

3 The recommendation of the Chair on that is the
4 same as the other confidential-related objections, in that where
5 they are legitimately protected documents under the applicable
6 legal authority, we will provide confidentiality protection.

7 Objection Number 6:

8 "The subpoena is void and/or
9 unenforceable because the
10 Declaration of Senator Joseph L.
11 Dunn in support of the subpoena
12 is legally defective in that it
13 is conclusory and argumentative,
14 does not contain the requisite
15 facts, is not based on the
16 personal knowledge of the
17 Declarant, and is impermissibly
18 stated as, 'the Committee is
19 informed and believes' "

20 and there is a case cite in the objection at this point in
21 time.

22 The Chair's recommendation is to overrule that
Page 85

23 objection. Again, it's premised on the fundamental, from the
24 Chair's perspective, the fundamental confusion between a
25 legislative subpoena and a court-issued subpoena that is found
26 in litigation procedures.

27 From our review of the law, the Declaration
28 actually is unnecessary, although provided, unnecessary for 9

1 legislative subpoenas.

2 Senator Bowen.

3 SENATOR BOWEN: Thank you, Mr. Dunn.

4 I think to further that just a little bit, it
5 makes no sense for a legislative subpoena to require that the
6 declarant have personal knowledge. There are, after all, only
7 120 of us, and it's highly unlikely that, out of 120
8 Legislators, that somebody would always have personal knowledge
9 as to any matter that might be a proper subject of
10 investigation. So, it's just ludicrous to use that condition in
11 a legislative proceeding.

12 CHAIRMAN DUNN: Okay.

13 MR. KIRBY: May I respond briefly?

14 CHAIRMAN DUNN: Hold on, Mr. Kirby. We're going
15 to give you the chance to respond at the end here.

16 Okay, let me go to Number 7, Objection Number 7,
17 again on Page Four:

18 "The subpoena is void and/or
19 unenforceable in that it seeks
20 documents and information already
21 in the Committee's possession or
22 equally available to the
23 committee from other public
24 sources in California."

25 As to that objection, it may be well founded.

26 And where you believe that we are in possession of such
27 documents that you don't wish to just repeat the production,
28 Mr. Kirby, we are happy to hear that from you. We do not seek
9

1 for a repetitive production of the same documents that you
2 believe are in our possession or are accessible to this
3 Committee from public sources.

4 MR. KIRBY: Your Honor, I had this discussion
5 with Mr. Drivon about, for example, all of the documents, if
6 documents were submitted to the Cal ISO, and I know that they
7 have been subpoenaed by the Committee requiring Enron to try to
8 reproduce documents that you've already subpoenaed from Cal ISO.

9 CHAIRMAN DUNN: Yes, I'm in agreement with you,
10 if the documents really are the same.

11 However, as you know -- now I'm going to draw you
12 back to your litigation world -- the document of Letter X that
13 may be submitted to the ISO might differ slightly than that same
14 letter in the files of Company Y.

15 MR. DRIVON: Or substantially.

16 CHAIRMAN DUNN: Or substantially different.

17 So, we're going to be cautious about that, but if
18 legitimately we're seeking the identical documents, your
19 objection is well founded, and we don't want you to have to
20 repeat it, and we don't want duplicative documents this the
21 various depositories.

22 SENATOR BOWEN: Again, Senator Dunn, for the
23 purposes of those who are not lawyers, you're talking about
24 things like a date stamp that may differ on a document or
25 handwritten notes; is that the --

26 CHAIRMAN DUNN: That's absolutely correct,
27 Senator Bowen. Thank you for the clarification.

28 So, we could have a letter from Mr. Smith to

1 Mr. Jones dated November 1st, but the copy that may sit with ISO
2 may be what's oftentimes called a clean copy, and copy of that
3 same letter that sits in Acme Generator's files may actually
4 have marginalia or other sort of very slight differences that
5 might make a difference in the investigation itself. So, we're
6 going to be caution for that.

7 But again, if we're really talking about
8 identical information, we're not seeking duplicative production
9 of those.

10 Moving on, Objection Number 8:

11 "The subpoena is void and/or
12 unenforceable because the
13 Declaration accompanying the
14 subpoena fails to show by
15 personal knowledge and with
16 specificity the materiality or
17 relevance of the documents
18 sought by this request. "

19 Refer to my recommendation in Objection Number 6
20 regarding the need for the Declaration as well as what's
21 required when it relates to a legislative subpoena versus a
22 subpoena under the CCP in a litigation context.

23 Objection Number 9:

24 "The subpoena is void and/or
25 unenforceable in that this
26 request is impermissibly vague
27 and indefinite. "

28 Now, that's one that goes to each different

1 document request and really can't be resolved without looking at
2 the specific document category that's been subpoenaed. So, on

3 that particular one, we'll simply leave it as, Mr. Kirby, where
4 in fact your client really doesn't understand because it's vague
5 and indefinite, just let us know and we're happy to engage in
6 the discussions and resolve those sort of what I'll consider to
7 be relatively minor disputes through further discussions.

8 Objection Number 10:

9 "The subpoena is void and/or
10 unenforceable in that the
11 specific request is argumentative,
12 conclusory or incomprehensible in
13 nature. "

14 The recommended ruling by the Chair is the same
15 as for Number 9, it applies to document requests specifically.
16 And where your client really has that concern, we'll engage in
17 discussions to clarify the specific document request or category
18 that's been subpoenaed.

19 Objection 11:

20 "The subpoena is void and/or
21 unenforceable in that it purports
22 to call for mass production of
23 huge volumes of documents, such
24 that it is unreasonably
25 burdensome and oppressive in
26 nature, and not reasonably
27 specific in scope. "

28 With respect to this one, the recommendation of
9

1 the Chair is to overrule the objection, but I want to share some
2 comments with you, Mr. Kirby.

3 As I mentioned before, we knew at the outset that
4 examining the market behavior in the California wholesale
5 electricity market would be document-intensive, to say the

6 least. Perhaps more document-intensive than your legal career
7 has ever seen before, and perhaps even mine. We knew that.

8 So, what we have said throughout the meetings --
9 not for Mr. Kirby's benefit, he knows this, but for everybody
10 else's benefit -- is, we want to manage the production in a way
11 that is practical for us on the Committee and here in the
12 Senate, and practical for the market participants.

13 We are working on that issue on an ongoing basis.
14 It is for that reason, both minimize the burden on the market
15 participants, and minimize the burden on this Committee, that we
16 established a priority list of documents that we asked to be put
17 into the depositories first, so that it could be manageable.

18 As we go forward, we'll continue to provide
19 second and third priority lists of documents so that this can be
20 done in a reasonably focused fashion and doesn't require the
21 proverbial data dump of documents, although there may be some
22 cynical market participants that would prefer to go that route.
23 We're trying to minimize the burdensomeness of our requests as
24 we take each step.

25 We know this is document-intensive. We will
26 continue to act in good faith and hope the market participants
27 will continue to do so, as they've done up to now, with respect
28 to managing the burden for both the Committee and the market

10

1 participants in the wholesale electricity market.

2 Objection Number 12:

3 "The subpoena is void and/or
4 unenforceable because the
5 subpoena was not personally
6 served on a custodian of
7 records of Enron as required by,
8 among other laws, California Code

9 of Civil Procedure Section 1987. "

10 The subpoena was served upon the agent for
11 service as required under California law. The custodian of
12 records, that official individual, we do not know the identity
13 of that individual and is why we chose to serve the agent for
14 service.

15 Again, this also relates to what I believe as the
16 Chair to be a fundamental difference between legislative
17 subpoenas and court-issued subpoenas. And the Chair's
18 recommendation is to overrule that objection.

19 Objection 13:

20 "The subpoena is void and/or
21 unenforceable because the
22 subpoena is not accompanied by a
23 court order authorizing its
24 issuance. "

25 Again, the Chair's recommendation is to overrule
26 the objection. This is not a judicial subpoena. It's an
27 entirely different legal animal. It's a legislative subpoena.

28 We're almost there, everybody. Don't worry. 10

1 Objection 14:

2 "The subpoena is void and/or
3 unenforceable in that it
4 improperly seeks documents
5 outside of the Committee's
6 proper investigatory authority. "

7 This is similar, albeit not identical, to
8 documents outside of the State of California. So, the real
9 issue in this objection is, what is the scope of our
10 investigative authority, and I believe relates probably to the
11 FERC objection asserted earlier here.

15 party, e. g. , seeking documents
16 pertaining to electricity
17 generation plants, costs of
18 generation, maintenance or
19 outages at such generation
20 plants, when this responding
21 entity owns no such electricity
22 generation plants in California. "

23 Mr. Kirby, this was one of your preliminary
24 objections. I surprised you by saying "sustained" where the
25 question actually is not applicable to the position of Enron in
26 the California energy market.

27 Just let us know which one of those you believe
28 it doesn't apply to, and certainly we're not trying to make your
10

1 client respond to something they have no ability to respond to.

2 And the last objection, Objection 17:

3 "The subpoena is void and/or
4 unenforceable in that it seeks
5 documents and information
6 protected by an individual's
7 rights to privacy. "

8 I will reassert the comments with respect to
9 confidentiality generally here. Where it's a legitimate right
10 to privacy, we are willing to enter into a confidentiality
11 agreement with Enron as we have done with other market
12 participants.

13 Before I turn it over to Mr. Kirby to respond to
14 those recommended rulings by the Chair, any questions, comments,
15 or concerns by the Committee?

16 SENATOR BOWEN: Just one question, and it has to
17 do with that last provision regarding the right to privacy.

21 Enron document in the first place or a private document. And
22 that's the objection here.

23 Certainly, my view is, looking at it on the face
24 of it, is that someone's calendar is a private, individual
25 matter.

26 SENATOR BOWEN: I suspect you wouldn't find the
27 case law supporting that in litigation.

28 There is law on that matter with regard to the
10

1 Governor, provoked by the press's attempt to get Governor
2 Wilson's calendar, which I think they were not allowed to do on
3 the grounds that it was a matter of protecting the privilege of
4 constituents, not the Legislature.

5 MR. KIRBY: Could I get the cite on that?

6 SENATOR BOWEN: Somebody versus Wilson.

7 MR. KIRBY: I want to be very clear --

8 SENATOR BOWEN: I would be very skeptical of
9 claims that, I mean, obviously what is desired is information
10 about whether either of those two individuals met, for example,
11 with ISO Board members who might have been setting policy, with
12 other generators or market participants, with members or staff
13 of the Federal Energy Regulatory Commission.

14 I would resist any attempt to limit in particular
15 that kind of information. And the telephone logs clearly go to
16 the same kinds of things.

17 It would be very useful for this Committee to
18 know if we're looking at whether we have a market structure that
19 overly relies on the Federal Energy Regulatory Commission, it
20 would be very useful to know whether there's regular
21 off-the-record contact between FERC, key FERC staff
22 investigating market manipulation, and generators and market
23 participants, particularly after today's FERC action, which is

24 another Enron victory. It's Ken Lay's dream world of having
25 condemnation power in four regional transmission organizations.

26 MR. KIRBY: I just wanted to answer her question.

27 CHAIRMAN DUNN: Okay, go ahead, Mr. Kirby.

28 MR. KIRBY: No, no, that was the question, is it
10

1 an event.

2 And I don't have these --

3 Can I just finish? I don't have the 112
4 categories memorized, so I wouldn't want it to be stated, but I
5 know that that was the reason for raising the claim of right to
6 privacy as an objection, because you have very specific, and in
7 my opinion, horribly over broad requests that are directed to a
8 number of individuals.

9 CHAIRMAN DUNN: And as I said, Mr. Kirby, in my
10 recommended rulings to the Committee as a whole, that where you
11 can establish legitimate legal grounds for that, and I agree
12 with Senator Bowen, that there is a misperception generally in
13 the legal profession that the right of privacy over documents,
14 the legal profession has a broader impression of what reality
15 has, the legal basis for privacy objections.

16 But again, where you can establish that on a
17 document-by-document basis, we are willing to enter into the
18 confidentiality agreement.

19 Senator Peace, and then, Mr. Kirby, get ready for
20 your final comments, Mr. Drivon, and then I think we may be
21 ready to move forward.

22 SENATOR PEACE: Two points.

23 Just as an aside with respect to the privacy
24 issue, I don't think any of us are interested in Mr. Lay or
25 anybody else's personal -- and to the extent that that kind of
26 situation can be accommodated, we should go the extra mile to

27 make sure that we're not extracting information that's
28 associated with his personal life.

10

1 CHAIRMAN DUNN: Agree.

2 SENATOR PEACE: Second, I want to make sure that
3 we get characterized on the record here how serious Enron's
4 decision to go to court is. And I really object to -- and
5 Counsel's made very clear -- that you've mischaracterized his
6 communication with you in an effort try make it look as though
7 our counsel recommended that you take this action.

8 This is an action taken by Enron. And I want to
9 put firmly on the record how serious an action this is from a
10 constitutional perspective.

11 You have attempted to characterize the
12 relationship between you, Enron, and the others we have served
13 subpoenas, and the Chair or this Committee, as though we are
14 combatants.

15 These are Legislators. They probably have a
16 variety of viewpoints with respect to ultimately adjudicating in
17 a legislative context what's the appropriate thing to do based
18 upon the receipt of this information.

19 For example, it could very well be that, after
20 looking at this information, Ms. Bowen is the Chair of the
21 Energy Committee, and having gotten the benefit of Mr. Dunn's
22 work here, may come to the conclusion that California should
23 follow Texas's lead in getting control of the entire
24 transmission grid in order to isolate itself from FERC.

25 And that's the point that Ms. Bowen alludes to in
26 the necessity of understanding more about what kind of access
27 the various companies have to FERC and its staff.

28 That's a particularly important question for

10

1 Enron, because Enron literally is the largest employer of former
2 FERC employees in the world. So, those questions are very
3 important here.

4 Now, for you to suggest that you need to go to
5 some, quote-unquote, "neutral third party" to rule on these
6 kinds of objections would be, in my view, the judicial
7 equivalent of telling a judge that the judge has to go out of
8 the courtroom to find some uninvolved party.

9 We are fact finders, as you actually, I think,
10 have subconsciously proven today by consistently referring to
11 the Chair as "his Honor". You didn't refer to him as --

12 MR. KIRBY: To a trial lawyer --

13 SENATOR PEACE: No, but listen to what you did.

14 CHAIRMAN DUNN: He's referring to a trial lawyer
15 as "your Honor".

16 SENATOR PEACE: Exactly. You didn't refer to
17 him as "distinguished counsel"; all right?

18 MR. KIRBY: I will stipulate that he is.

19 SENATOR PEACE: Despite the fact that you're both
20 lawyers.

21 I think you know perfectly well how absurd these
22 positions are.

23 And I just want to make sure that you are
24 communicating back to your client the seriousness of the
25 escalation, because you just went to war with the State of
26 California. You just declared war on this state's political
27 system. You just declared war on the people of this state.

28 MR. KIRBY: Senator, let me respond to that. And
10

1 let me make sure we --

2 SENATOR PEACE: You've already initiated a war
3 economically. Now you're initiating a political war.

4 MR. KIRBY: Senator, the question -- and you
5 heard arguments today about waiver. The question I asked of
6 Mr. Drivon was very specific, and told him this. I gave him the
7 example. I said, I don't want to come to this hearing tomorrow
8 and have the first question out of Senator Dunn's mouth be,
9 "Mr. Kirby, has your client taken any steps to legally challenge
10 the subpoena that was -- that is the subject of this
11 proceeding?"

12 And if I say no, he'd say, "Fine, you've waived
13 your right to challenge that subpoena."

14 Mr. Drivon and I were on the same page. And I'll
15 tell you, sir, that I communicated that to Houston.

16 They agree, a lawsuit is premature. It was only
17 when I got a call back saying forget everything I said, a
18 lawsuit would -- if we had a miscommunication, fine.

19 SENATOR PEACE: Do not characterize that as a
20 miscommunication.

21 CHAIRMAN DUNN: Hold on.

22 SENATOR PEACE: Counsel has said both publicly
23 and privately, it's not a miscommunication.

24 You are trying to hide behind -- which is a very
25 important clarification -- that Counsel didn't want you to come
26 in here and use the prior communication as an alleged
27 essentially legal advice, saying, "Well, we were told we didn't
28 have to go to court, and therefore you kept us from preserving

1 some right."

2 You made an independent legal judgment, or your
3 client made an independent legal judgment. I would argue it's
4 more of a political judgment than a legal judgment.

5 But you decided to go in court. That's fine.

6 But don't sit here and simultaneously play the victim by

7 claiming you're being treated differently than everybody else.

8 It takes quite -- you have to go a long way to
9 manage to get far enough over on the evil scale to get beyond
10 Reliant and Dynegy, but you've succeeded.

11 CHAIRMAN DUNN: Mr. Kirby, let's go back to any
12 comments you wish to make on the Chair's recommended rulings.
13 We've been given a grace until 1:45, so let's all of us do it
14 quickly.

15 MR. KIRBY: Your Honor, this will not be in any
16 particular -- I want to address the comments -- the ruling and
17 the comments by Senator Bowen about the requirement for a
18 declaration.

19 There's no requirement that I'm aware of, and I
20 don't believe we ever made the argument, that the declaration
21 has to be from a Legislator. Ms. Montgomery, Mr. Drivon, every
22 day lawyers have subpoenas duces tecum issued by declaration.

23 But our position is, when you ask for a subpoena
24 duces tecum, you must have a declaration, and it has to comply
25 with the law.

26 And the Court, Chair, has ruled otherwise, but
27 that's our position, and I stand on it, your Honor.

28 But I want to make the point that we're not

11

1 saying that the declaration can only be from a Senator. What
2 we're saying is, once the declaration -- and I dare say that --

3 CHAIRMAN DUNN: Let me correct you.

4 Nobody's suggesting that you were making the
5 argument it had to be from a Senator or didn't have to be from a
6 Senator.

7 And again, Mr. Kirby, I just want to remind you,
8 and now I'm going to pretend to be the "your Honor", anything
9 new that you want to add? We don't want to plow through the old

10 ground. Anything new you want to add here?

11 MR. KIRBY: Could the Chair explain to me what
12 the procedure is now in terms of voting on what I have --

13 CHAIRMAN DUNN: Yes. I know what your question
14 is. I don't mean to cut you off, Mr. Kirby.

15 Yes. Unless there's some new legal argument you
16 wanted to advance to any of the objections, I'm prepared to make
17 a recommendation via a motion to this Committee that will
18 embrace what the next steps are.

19 I said to you about a half an hour ago, bear with
20 me, because that recommendation, while clearly isn't going to be
21 satisfactory to Enron, may provide the relief to the due process
22 argument that you have advanced both in your papers and today.

23 So, unless you have other comments, I'm happy to
24 make that recommendation at this point.

25 MR. KIRBY: My question though is, I want to go
26 to the objections.

27 Does the Chair make recommendations on the
28 objections, and the entire panel or a quorum has to vote?

11

1 CHAIRMAN DUNN: The motion that I'm going to make
2 will embrace that the Committee adopt the Chair's
3 recommendations.

4 Now, there are Committee Members here. If they
5 wish to dissent from that, they're free to do so.

6 MR. KIRBY: Could I inquire for the record which
7 Committee Members are here now to vote on that motion?

8 CHAIRMAN DUNN: Here's the problem with the
9 legislative process. We've got folks that are physically here;
10 we may also have folks in their offices listening to this on the
11 various radio and television that's provided throughout the
12 building to all of our offices.

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13 SENATOR BOWEN: Mr. Dunn, more likely, the
14 Members who are not here are in another committee. I am
15 supposed to be in Revenue and Taxation right now, as well as in
16 Constitutional Amendments, and presenting a bill in Assembly
17 Labor.

18 So, it basically means that we just need to take
19 the time, if Senator Speier, whose committee is due in this room
20 next, would indulge us for the couple minutes that it may take
21 to get the --

22 CHAIRMAN DUNN: Our folks here.

23 We've got about five minutes to go. Why don't we
24 hold off, then I'll make the motion, Mr. Kirby.

25 SENATOR BOWEN: Before you do that, Mr. Dunn,
26 just let me clarify that these committee hearings, in large
27 measure, started add 1:30, which is the reason that just a few
28 minutes ago you saw people, who had otherwise been here, leave
11

1 the room

2 CHAIRMAN DUNN: Understood. That's what we get
3 for going on way too long.

4 Mr. Kirby, I know it's the first time you've been
5 in here with the Committee. Everybody who has been here before
6 knows full well that any time I try to estimate the length of
7 the Committee, just multiply it by three or four, and you may
8 get a more proper --

9 MR. KIRBY: It's a lawyer disease.

10 CHAIRMAN DUNN: It's a lawyer disease; that's
11 right. Give us the opportunity to talk, we will do it.

12 Mr. Drivon, as we're waiting for some of the
13 other Members to arrive for the motion, any additional comments
14 you wish to make? And again, same cautionary comment I gave to
15 Mr. Kirby, don't plow over old ground.

16 MR. DRIVON: No, Senator, but what I would like
17 to do is bring us back to where we are, because I don't think
18 that the work of this Committee today is finished when we have
19 this motion voted upon. Because this only deals with Step One
20 of the situation today, ruling on the objections.

21 We still have not determined what's going to
22 happen after the objections are ruled on, whether or not there
23 is in attendance today a custodian of records, those kinds of
24 questions.

25 CHAIRMAN DUNN: I understand, and I appreciate
26 your comments, but those issues, I think, will also be embraced
27 within the motion that I've been jotting out, listening to
28 everybody here.

11

1 Patience, everybody, as we collect up our Members
2 here.

3 SENATOR BOWEN: Let me just ask one further
4 question to refresh my memory.

5 I believe that when Senator Morrow made the
6 motion at the last hearing of this Committee, that it included
7 what was, in essence, an automatically triggered mechanism for
8 expungement --

9 CHAIRMAN DUNN: True.

10 SENATOR BOWEN: -- should either Enron or Mirant
11 come into compliance.

12 CHAIRMAN DUNN: That's true, Senator Bowen, and
13 you'll hear it in my motion here as well, too, which is the
14 middle ground I keep alluding to in rather vague terms to
15 Mr. Kirby.

16 SENATOR BOWEN: In other words, the goal was not
17 to create a contempt finding, but rather to secure the
18 information that the Committee needs in order to do its work

19 product.

20 CHAIRMAN DUNN: Yes.

21 Just for those that are here for the Select
22 Committee to Investigate, as soon as we finish, please exit out
23 into the hall for anybody you want to talk to, et cetera, so
24 that we get Senator Speier's committee.

25 Senator Kuehl, we need you for just one second,
26 and we're rounding one more. We'll hold you for just a couple
27 minutes, if that's okay.

28 We have our quorum. If I can get everybody's
11

1 attention again. We need to do this quickly. We've had a grace
2 period that we are pushing to beyond its limit.

3 The Chair's going to make the following motion.
4 If everyone would stay closely in tune to it, there are many
5 parts to it. It's going to be one motion, but relate to both of
6 the companies that are before us today, Mirant and Enron.

7 Let me begin with Mirant. The Chair's motion is
8 as follows: As to Mirant, that we terminate and purge the
9 process of contempt and rescind the motion that was made as to
10 Mirant last hearing, June 28th; that we establish a hearing date
11 in approximately 30 days to review continued compliance with the
12 subpoena by Mirant. Those two points as to that company.

13 As to Enron, the motion is to adopt the Chair's
14 recommendations as to the rulings on the objections; that we
15 continue the process of contempt by forwarding a report to the
16 full Senate. However, that report must be written. It will be
17 prepared but not available for referral to the full Senate
18 until, at the very earliest, early next week, but that it be
19 prepared and circulated for signature; but that if at any time
20 prior to that report being referred to the full Senate Enron
21 comes into compliance by agreeing to do what the other market

22 participants have done thus far, which is establish a document
23 depository, which may have already been done, provide the
24 priority documents, and sign the confidentiality agreement, that
25 the report will not be referred to the full Senate for further
26 action in this contempt process; and if such progress is made,
27 that the same ruling as to Mirant today would then apply to
28 Enron.

11

1 Any clarification necessary on the motion?

2 Senator Escutia.

3 SENATOR ESCUTIA: I'd like a point of
4 clarification with regard to compliance.

5 CHAIRMAN DUNN: Yes.

6 SENATOR ESCUTIA: Assuming all applicable
7 privileges apply, are you asking for full compliance, partial
8 compliance, substantial compliance?

9 CHAIRMAN DUNN: The answer is, we have provided
10 to each of the market participants, Senator Escutia, a list of,
11 I believe -- Mr. Drivon, correct me if I'm wrong -- 10
12 categories of documents -- 16. My apologies. Sixteen
13 categories of documents which we called the priority requests,
14 and that we will terminate the contempt process if they agree to
15 comply immediately with those 16 categories, production of those
16 16 categories.

17 Senator Peace.

18 SENATOR PEACE: Does agreement to comply also
19 imply the dropping of the court challenge?

20 CHAIRMAN DUNN: No. We didn't make any reference
21 to that whatsoever.

22 My position as to that, at least the Chair's
23 position, is the same as it was yesterday, Mr. Kirby: Do
24 whatever you feel you need to do, and we will respond

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25 accordingly re the litigation.
26 Any other questions, concerns, clarifications by
27 the Committee?

28 Hearing none, we've got the motion.

11

1 Secretary, are you ready? Call the roll on the
2 motion, please.

3 SECRETARY MORALES: Chairman Dunn?

4 CHAIRMAN DUNN: Aye.

5 SECRETARY MORALES: Chairman Dunn Aye. Senator
6 Bowen.

7 SENATOR BOWEN: Aye.

8 SECRETARY MORALES: Senator Chesbro. Senator
9 Escutia.

10 SENATOR ESCUTIA: Aye.

11 SECRETARY MORALES: Senator Escutia Aye. Senator
12 Johannessen.

13 SENATOR JOHANNESSEN: Aye.

14 SECRETARY MORALES: Senator Johannessen Aye.

15 Senator Kuehl.

16 SENATOR KUEHL: Aye.

17 SECRETARY MORALES: Senator Kuehl Aye. Senator

18 Morrow. Senator Sher.

19 SENATOR SHER: Aye.

20 SECRETARY MORALES: Senator Sher Aye.

21 Adoption of motion passes.

22 CHAIRMAN DUNN: Vote?

23 SECRETARY MORALES: Six-zero.

24 CHAIRMAN DUNN: Six-zero.

25 We're through, everybody. Thank you very much,

26 Mr. Kirby.

27 MR. KIRBY: Can I ask a question?

28

CHAIRMAN DUNN: You may, go ahead.

11

1

MR. KIRBY: At what point do you provide us with
the written report that you're talking about?

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CHAIRMAN DUNN: We have to prepare it. There is
no requirement, as Mr. Drivon is indicating, that we provide it
to you, but I have said from the beginning this will be an open
process. If we actually get that far, that is that Enron does
not come into compliance as the others have done on those three
items, we will provide you a draft copy of that. It's simply
not ready at this point in time, because we've got to prepare
it.

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MR. KIRBY: Thank you very much.

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CHAIRMAN DUNN: Thank you, everybody for your
patience. Thank you, Mr. Kirby.

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[Thereupon this portion of the
Senate Select Committee hearing
was terminated at approximately.
1:55 P. M.]

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CERTIFICATE OF SHORTHAND REPORTER

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I, EVELYN J. MIZAK, a Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing transcript of the Senate Select Committee hearing was reported verbatim in shorthand by me, Evelyn J. Mizak, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, 2001.

EVELYN J. MIZAK
Shorthand Reporter